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KEY WEST IN THE CIVIL WAR ERA

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CONTENTS

Editor's Note <i>Dr. Anne Richardson Oakes</i>	191
The Schooner Enterprise: a Forgotten Key West Murder Case <i>Robert M. Jarvis</i>	195
The Confederate Admiralty Court at Key West <i>Robert M. Jarvis</i>	227
A Key West "jack-of-all-trades": The Strange Life, and Peculiar Death, of Dr. Daniel W. Whitehurst <i>Robert M. Jarvis</i>	255
Mr. Marvin Goes to Key West <i>James M. Denham</i>	293
Judge William Marvin and the Law of Salvage <i>Steven F. Friedell</i>	317
The Confederate Law of Prize <i>John Paul Jones</i>	337
"Keeping Tabs": Spanish Consular Activities in Key West, 1829-70 <i>Sean T. Perrone</i>	345
Great Britain and the Confederacy <i>Michael J. Slinger</i>	357
Island Musings: a Selective Bibliography of Early Key West <i>Robin C. Schard</i>	377
"Mad Passions of the Hour": Key West and the Civil War <i>Canter Brown, Jr.</i>	391

EDITOR'S NOTE

This issue of the *British Journal of American Legal Studies* is the latest in our series of occasional “special issues.”¹ It focuses on Key West, Florida, the southernmost city in the continental United States, during its first 50 years as an American possession (1821-71). Of course, over four of those years (1861-65) the Confederate States of America (“CSA”) and the United States battled each other in what remains the country’s bloodiest war.

The issue opens with a triptych of articles by Professor Robert M. Jarvis (Nova Southeastern University). Jarvis begins his exploration of the “island city” with an 1859 murder trial. Presided over by William Marvin, Key West’s legendary federal judge, the case arose from a mutiny aboard the schooner *Enterprise*. Because most of the court’s records were destroyed in the Great Key West Fire of 1886, Jarvis’s account is the first to pull together the affair’s myriad details and present them in one place. In doing so, Jarvis adds to our knowledge of capital punishment by reporting on a previously unknown execution (the second in the city’s history).

In his second offering, Jarvis describes the Confederacy’s 1861 effort to establish a maritime court at Key West. The CSA’s plan failed, however, because the city remained in Union hands throughout the war. Once again, Jarvis adds to our knowledge by locating a photograph of Judge McQueen McIntosh, who the CSA had tapped to run the court.

Jarvis finishes with a biography of a lawyer-turned-doctor named Daniel W. Whitehurst. Born in Virginia in 1807, Whitehurst moved to Key West in 1845 (the year Florida, previously a U.S. territory, became a U.S. state). A slaveholder and ardent secessionist, Whitehurst was targeted throughout the war by Union troops but managed to remain in the city. After hostilities ended, he was elected to the Florida Senate and later served as Key West’s mayor. In January 1872, he died at his home in what Jarvis points out may have been a suicide.

Jarvis’s three articles are accompanied by five essays “inspired” by his research. In the first, Professor James M. Denham (Florida Southern College) recounts Marvin’s early years in Key West, the result of his 1835 appointment as the territory’s U.S. Attorney.

Next up is Professor Steven F. Friedell (Rutgers University). His essay looks at Marvin’s celebrated treatise on the law of salvage. Published in Boston in 1858, it cemented Marvin’s reputation as one of the United States’ leading experts on maritime law.

Professor John Paul Jones (University of Richmond) then examines how the Confederacy went about handling prize cases during the Civil War. As he explains, the Union’s naval blockade severely limited the CSA’s opportunity to capture prizes. But on those rare occasions when they did hear prize cases, Confederate judges applied the same law as U.S. judges.

Shifting gears from the domestic to the foreign, Professor Sean T. Perrone (Saint Anselm College) summarizes the work of Spain’s consular service. Florida was part of

1 Our previous special issues have examined, respectively, judicial recusal (Spring 2015); forensic evidence (Fall 2015); free trade agreements (Fall 2016); the career of U.S. Supreme Court Justice Antonin Scalia (Spring 2017); and the intersection of American politics, history, and law (Fall 2019).

Spain's "New World" empire from 1513 to 1763 and again from 1783 to 1821. As Perrone explains, soon after King Ferdinand VII sold Florida to the United States (1819; consummated 1821), Spain opened a consulate in Key West to keep an eye on its interests in the region.

The final essay, by Professor Michael J. Slinger (Widener University), tells the story of the Confederacy's unsuccessful effort to convince Great Britain to become its ally. At the start of the war, the CSA's leaders were convinced that Britain's need for cotton would force it to support the South. But as Slinger details, the British public's aversion to slavery, coupled with the expansion of cotton production in Egypt and India, resulted in Britain refusing to take sides.

Following the five essays is an annotated bibliography compiled by Professor Robin C. Schard (University of Miami). Those who wish to learn more about Key West during its early years will find it to be a first-rate guide, collecting as it does general, legal, and popular culture works. Readers who are new to the subject are encouraged to start with Schard's bibliography to gain a handle on the topics discussed by Jarvis and the other contributors.

Professor Canter Brown, Jr. (Fort Valley State University) wraps matters up with a review of two recent books about Key West's role in the Civil War: Mike Pride's *Storm Over Key West: The Civil War and the Call of Freedom* (2020) and John Bernhard Thuersam's *Key West's Civil War: "Rather Unsafe for a Southern Man to Live Here"* (2022). As Brown reports, although both tell the same story, they do so from vastly different perspectives (Pride from the North's and Thuersam from the South's).

On behalf of all of us, we hope you enjoy this special issue of the *Journal*.

Dr. Anne Richardson Oakes
Editor-in-Chief



Aerial view of Key West (c. 1850)
Photograph courtesy of the State Archives of Florida / Florida Memory PR05945

THE SCHOONER ENTERPRISE: A FORGOTTEN KEY WEST MURDER CASE

Robert M. Jarvis*

ABSTRACT

In 1859, Key West found itself transfixed by a sensational criminal trial. Styled United States v. Carcer, Eloy, and Davis, and presided over by William Marvin, the island's legendary federal judge, the case involved a mutiny-murder aboard the slave ship Enterprise. Although famous in its day, the tale has been all but forgotten due to the Great Key West Fire of 1886, which destroyed nearly every record of the affair.

KEYWORDS

Africa, Capital Punishment, Criminal Justice, Criminals, Cuba, Early Newspapers, Executive Clemency, Federal Courts, Fire, Great Britain, Key West, Murder, Mutiny, Slavery, William Marvin

CONTENTS

I. INTRODUCTION	196
II. THE MURDER	202
III. THE GRAND JURY.....	212
IV. THE TRIAL.....	214
V. AFTERMATH.....	220
VI. CONCLUSION.....	226

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I. INTRODUCTION

In November 1859, all eyes in Key West were focused on the Stone Building, the new home of the U.S. District Court for the Southern District of Florida.¹ Inside, Judge William Marvin was presiding over a trial involving a most heinous murder,²

¹ This was the first term that the court was sitting in the Stone Building:

Shortly after the admission of Florida to the Union, the United States court was moved from the county court house to a . . . building belonging to Wall & Pinckney, fronting on Wall street[.] This building was destroyed by fire in 1859, and the court moved to the “Stone building” situated on the corner of Caroline and Whitehead streets. . . .

[The Stone Building] is one of the oldest buildings in Key West, and for many years had the unique distinction of being the only one not built entirely of wood. It was known as “The Stone Building” [because it was] built [out] of cement from a cargo of that material wrecked at Key West. It is a quaint three-story structure with a high pitched roof, having a narrow balcony supported by consoles of solid cement, extending the entire side on Whitehead street. On the gable end was once a similar balcony, but it has been taken down, and only the consoles remain. Above the side balcony is a large plaster mask of the builder, Mr. John G. Ziriach, who kept the foremost bakery of his day. Before it acquired the cognomen of the “Stone Building” it was known as the “Ziriach Building.”

JEFFERSON B. BROWNE, *KEY WEST: THE OLD AND THE NEW* 68, 75 (1912). For more on the 1859 fire, see *Later [News] from Havana: Destructive Fire at Key West*, CHARLESTON DAILY COURIER (SC), May 30, 1859, at 2.

Due to the quick thinking of Joseph B. Browne, the court’s records were saved from the 1859 fire. See *Terrible Conflagration*, CHARLESTON DAILY COURIER (SC), May 30, 1859, at 2 (“The Records of the U.S. District Court were all saved by the [court’s] Clerk, J.B. Browne.”). In his book, *Jefferson Browne* provides a lengthy profile of his father *Joseph Browne* (1814-88) and explains that Joseph became the Southern District’s clerk in 1850. See BROWNE, *supra*, at xii, 211, 225-26. See also *Joseph Beverly Browne*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/32092494/joseph-beverly-browne>.

² Because the trial involved a capital crime, Marvin technically was sitting as a circuit court judge and not as a district court judge:

Capital punishment was prescribed for treason, murder, forgery, piracy, and felonies committed on the high seas by the First Crimes Act [Act of Apr. 30, 1790, 1 Stat. 112]. . . .

Criminal jurisdiction was divided between the two federal courts: namely, the District and the Circuit Courts. Under the Judiciary Act of 1789 [Act of September 24, 1789, 1 Stat. 73], the district court was limited to crimes for which the penalty did not exceed a whipping and a small fine, or a term of punishment not exceeding six months. . . . This distinction in criminal jurisdiction was abolished in 1842 when the district court was given concurrent jurisdiction with the circuit court in all criminal actions which were not capital offenses. . . . Some two decades

one that had captivated the city for months. The victim was a New Orleanian named Vicente (routinely spelled “Beciente” in news reports) A. Morantes.³ At the time of his death, Morantes had been the captain of the schooner *Enterprise*.⁴ On trial were two members of his crew: Alejandro Carcer and Guillot Faustin Eloy. Testifying for the prosecution (through an interpreter) was fellow crew member Jose Maria Ortega.

By the time of the case, Marvin was a revered figure. Named to Key West’s federal bench in 1839, when Florida was still a territory, he had been reappointed in 1847 when the Southern District was created.⁵ In 1858, Marvin had published *A Treatise on the Law of Wreck and Salvage*, a 375-page work that had won him wide praise and cemented his reputation as a national expert in maritime law.⁶

later, one commentator observed that “indictments for all offenses . . . may be found indifferently either in the district or circuit court. . . .” He further observed that the district attorney could move that the case be transmitted from one court to the other for trial, unless it involved a capital offense, in which case it had to be transferred to the circuit court. By this date, the district court judge often presided in both the circuit and district courts. The district court judge’s dual capacity provided a basis for the general statement that prior to the abolishment of the circuit courts in 1911, the district court was essentially a criminal court.

ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 161 (2d ed. 2002) (footnotes omitted).

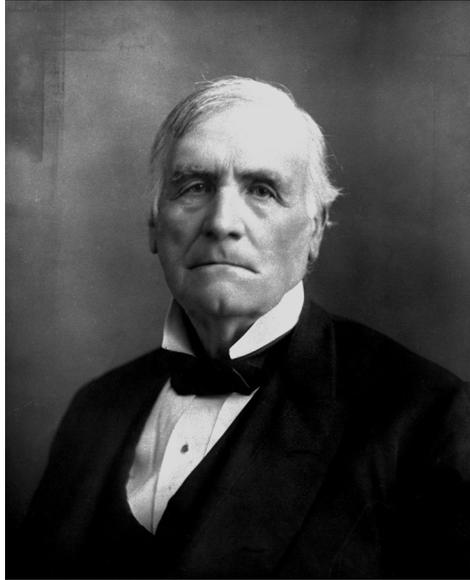
³ In the 1850 federal census, the last one taken before his death, Morantes is listed as living in New Orleans and working as a cigar maker. The census further indicates that Morantes was born in Louisiana in 1816 and has both a wife (Adele) and a five-year-old daughter (Rosine). See OFFICE OF THE SECRETARY OF THE INTERIOR, *THE SEVENTH CENSUS OF THE UNITED STATES: 1850 (1853)* (Lines 7-9 of Schedule I.—Free Inhabitants in the City of New Orleans, Ward No. 7, Municipality No. 1, in the County of Orleans, State of Louisiana, enumerated Sept. 17, 1850).

⁴ The term “schooner” describes any fast cargo or passenger ship having at least two masts. For a further discussion, see KARL HEINZ MARQUARDT, *THE GLOBAL SCHOONER: ORIGINS, DEVELOPMENT, DESIGN AND CONSTRUCTION, 1695-1845*, at 7 (2003).

⁵ See KERMIT L. HALL & ERIC W. RISE, *FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990*, at 10-12, 22-36 (1991).

⁶ See WILLIAM MARVIN, *A TREATISE ON THE LAW OF WRECK AND SALVAGE* (1858). As has been noted elsewhere, Marvin’s book immediately became “the standard text on [its] subject.” Rodney E. Dillion, Jr., *South Florida in 1860*, 60 FLA. HIST. Q. 440, 453 (1982).

For a further profile of Marvin (1808-1902), see *William Marvin*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/69724797/william-marvin>. As this source explains (in a biographical note prepared by Linda Davis), Marvin, a native of Fairfield, New York, came to Key West in 1835 when President Andrew Jackson appointed him U.S. District Attorney. Marvin remained in the city until 1863, when he resigned from the federal bench and moved to New York City for his health. In 1865, Marvin relocated to Tallahassee after President Andrew Johnson named him Florida’s provisional governor. Elected to the U.S. Senate in 1866, Marvin was prohibited from taking his seat because Florida had not yet been readmitted to the Union. A short time later, Marvin moved to Skaneateles—a small town in central New York, not far from his birthplace—and spent the remainder of his life there.



Judge William Marvin (c. 1865)

Photograph courtesy of the State Archives of Florida / Florida Memory GV000486

The government was represented by U.S. District Attorney John L. Tatum, who was being assisted by Walter C. Maloney, Sr. Little is known about Tatum, who had been appointed to his post just one year earlier at the age of 21.⁷ In contrast, Maloney was a long-time Key Wester.⁸

⁷ Tatum (1837-75) was a native of Monticello, Florida, and the brother-in-law of James T. Magbee, a powerful Tampa politician. See Kyle S. VanLandingham, *James T. Magbee: "Union Man, Undoubted Secessionist and High Priest in the Radical Synagogue,"* 20 SUNLAND TRIB. (Journal of the Tampa Historical Society) 10, 14 (1994). Tatum undoubtedly secured his office with Magbee's help.

An ardent secessionist, Tatum resigned as District Attorney in 1861, see BROWNE, *supra* note 1, at 211, and soon left Key West. The 1870 federal census, taken a few years before his death, shows Tatum back in Monticello working as a merchant. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE NINTH CENSUS OF THE UNITED STATES: 1870 (1872) (Page 16, Line 26 of Schedule 1.—Inhabitants in [the] Town of Monticello, in the County of Jefferson, State of Florida, enumerated Aug. 16, 1870). See also *John Lawrence Tatum*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/68332290/john-lawrence-tatum>.

⁸ As has been explained elsewhere,

Colonel Walter C. Maloney, Sr., [1813-84] . . . first arrived in the Florida Keys in the 1820's [from his hometown of Darien, Georgia]. . . . He went on to serve his community in many capacities, including [Monroe County] Clerk of the Court, Mayor, State Legislator, Judge Advocate of the U.S. Naval Courts in Key West, U.S. Marshal, and U.S. Postmaster. In 1876, he wrote the earliest historical account of Key West, "A Sketch of [the History of] Key West[, Florida]."

On the other side of the courtroom, Carcer and Eloy were being jointly defended by Winer Bethel and Samuel J. Douglas. Bethel was the county's probate judge.⁹ Douglas was a former Florida federal judge.¹⁰ Both men had assumed responsibility for the defense at Marvin's request.¹¹

Also in the courtroom were the 12 jurors who would determine whether the defendants were innocent or guilty. As Marvin later remarked, several were "seafaring men."¹²

Although headline-making in its day, the *Enterprise* case now has been all but forgotten.¹³ Several factors account for this loss of memory.

History, SPOTTSWOOD COMPANIES, at <https://www.spottswood.com/history>. For a further profile of Maloney, see BROWNE, *supra* note 1, at 182 (describing Maloney as having "a spark of genius, that often irradiated the dullness of pending legal business, and was a sure guarantee against any stagnation of affairs when he was present."). See also *Walter Cathcart Maloney Sr.*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/40318805/walter-cathcart-maloney>.

⁹ Bethel (1816-77) had been named Monroe County's probate judge in 1858. In 1862, he was arrested as a Confederate sympathizer and imprisoned at Fort Monroe in Hampden, Virginia, for nearly a year. Subsequently, he returned to Key West and in 1872-73 served as the city's mayor. He then became Monroe County's circuit court judge, a position he held until his death in 1877. See BROWNE, *supra* note 1, at 56, 69, 94. See also *Winer Bethel*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/18287692/winer-bethel>. According to Browne: "Circuit Judge Winer Bethel was a large, portly, handsome man, with full curly beard, and dignified demeanor, whose appearance was always calculated to impress. He came to Key West from Nassau, [Bahamas], in 1847. . . ." BROWNE, *supra* note 1, at 182.

¹⁰ Douglas (1812-73), a native of Petersburg, Virginia, was appointed to Florida's federal Superior Court for the Middle District in 1841 by President John Tyler (Douglas lost his seat in 1845 after Florida became a state and, as a result, the court was abolished). In 1849, Douglas was named Key West's Collector of Customs by President Zachary Taylor (Douglas was replaced in 1853 after the Whigs failed to hold the White House). In 1866, Governor David S. Walker, a Democrat, named Douglas to the Florida Supreme Court (Douglas was ousted in 1868 after Republican Harrison Reed beat Democrat George W. Scott in the race to succeed Walker). For a biography of Douglas, see *Justice Samuel James Douglas*, FLORIDA SUPREME COURT, at <https://www.floridasupremecourt.org/Justices/Former-Justices/Justice-Samuel-James-Douglas>. See also *Samuel James Douglas*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/10126341/samuel-james-douglas>.

¹¹ See *infra* text accompanying note 50. Carcer and Eloy were lucky to have such competent counsel. As revealed by the 1860 federal census (taken just a few months after the trial), Florida had a mere 173 lawyers. See *State of Florida—Table No. 6—Occupations*, POPULATION OF THE UNITED STATES IN 1860: FLORIDA, at <https://www2.census.gov/library/publications/decennial/1860/population/1860a-09.pdf> (at page 57). Of this number, only three were reported practicing in Key West: Bethel; Douglas; and Maloney. See *All 1860 United States Federal Census Results*, available at <https://www.ancestry.com/> (using the search terms "lawyer," "Key West," and "male").

¹² See *infra* text accompanying note 65.

¹³ Curiously, neither Browne's book, *supra* note 1, nor Maloney's book, *supra* note 8, mention the case. While Browne wrote his recollections 53 years after the trial, Maloney was a mere 17 years removed from the case. Several more modern references do exist but all either contain errors or are woefully incomplete. See, e.g., Bessie Wilson DuBois, *Jupiter Inlet*, 28 TEQUESTA 19, 27 (1968) (incorrectly claiming that *each* of the mutineers "had \$1,925 in gold on his person" and that the *Enterprise* never was found); Tom

First, the proceedings produced no published opinions.

Second, the official case file was lost in the Great Key West Fire of 1886. Possibly the work of Spanish arsonists,¹⁴ the flames burned out of control for the better part of a day.¹⁵ By the time they finally were extinguished, they had consumed two-thirds of the city's business district, caused \$2 million in property losses (the equivalent today of \$66.8 million¹⁶), and thrown 4,000 people (constituting a quarter of the local residents) out of work.¹⁷ The disaster also destroyed most of the court's records:

In 1885[, Key West's federal court] was moved to a building then belonging to Mr. John W. Sawyer, on the corner of Front and Fitzpatrick streets, which was destroyed in the fire of 1886. This was most unfortunate, as all the original papers and many records of important cases were lost.¹⁸

Hambright, *Today in Keys History*, KEY WEST CITIZEN (FL), Dec. 3, 2020, at 2A (brief entry explaining that Marvin sentenced Carcer and Eloy on December 3, 1859); Wesley Stout, *The Beachcomber*, FORT LAUDERDALE NEWS (FL), Apr. 19, 1964, at 12 (short description of Morantes's death with no mention of the trial).

- ¹⁴ Because the fire broke out in the San Carlos Hall, the home of Key West's Cuban independence movement, some people believe the fire was intentional:

Cubans in Key West continued supporting the revolt [against Spain] until their attention was distracted by their own disaster that struck in the early morning hours of March 30, 1886. As the population slept, a fire broke out in the San Carlos Hall which quickly spread out of control enveloping large portions of the city. Before it could be extinguished some 600 buildings worth an estimated \$2,000,000 were destroyed, a disaster unprecedented in the city's history. . . .

Details regarding how the fire started are not clear, but some suspected it was not accidental. Perhaps a Spanish agent's attempt to destroy San Carlos, symbolic of the revolutionary munity, developed into something more than was intended. When informed of the catastrophe, [the rebel leader Maximo] Gómez indicated he was not surprised, suggesting that he believed the Spanish may have been behind it. Whatever the cause, it resulted in paralyzing and hopelessly demoralizing the revolution's most active center of support, depriving the insurgents of critically needed financial resources and moral backing.

Gerald E. Poyo, *Cuban Patriots in Key West, 1878-1886: Guardians at the Separatist Ideal*, 61 FLA. HIST. Q. 20, 34-35 (1982) (footnotes omitted).

- ¹⁵ See *Key West in Flames*, N.Y. TIMES, Mar. 31, 1886, at 1; *The Key West Fire*, N.Y. TIMES, Apr. 1, 1886, at 1; *Destitution at Key West*, N.Y. TIMES, Apr. 2, 1886, at 5; *For the Fire Victims*, N.Y. TIMES, Apr. 3, 1886, at 2; *An Appeal from Key West*, N.Y. TIMES, Apr. 5, 1886, at 2.

- ¹⁶ See S. Morgan Friedman, *The Inflation Calculator*, at <https://westegg.com/inflation/>.

- ¹⁷ See BROWNE, *supra* note 1, at 152-53.

- ¹⁸ *Id.* at 68.

One item that did survive the fire is the court's journal, which is titled *General Minutes*.¹⁹ In it are 14 pages of handwritten notes about the *Enterprise* case.²⁰

Third, only certain issues of the *Key of the Gulf*, Key West's weekly newspaper, still exist.²¹ Established in 1855 but shut down in 1861 because of its editor's pro-secession leanings,²² the *Key of the Gulf* covered the *Enterprise* case with zeal. Thus, to piece the tale together and present it here, it has been necessary to supplement the surviving issues of the *Key of the Gulf* with articles from other contemporary newspapers.²³ Many of these latter articles reprint the accounts published in the missing *Key of the Gulf* issues either verbatim or with only minor editing.

¹⁹ This item was found for me by Sara E. Brewer in the National Archives in Atlanta. See E-mails from Sara E. Brewer, Archives Specialist, National Archives (Atlanta), to the author, dated Dec. 8, 2021, at 2:02 p.m., and Jan. 11, 2022, at 9:55 a.m. (copies on file with the author). For a complete listing of the Southern District's extant historical files (all of which are stored in the National Archives in Atlanta), see *Record Group 21*, NATIONAL ARCHIVES, at <https://www.archives.gov/research/guide-fed-records/groups/021.html> (under "21.11.5—Records of the Southern District of the U.S. Territorial Court," "21.11.6—Records of the U.S. District Court for the Southern District," and "21.11.7—Records of the U.S. Circuit Court for the Southern District").

²⁰ See 1 GENERAL MINUTES—U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, KEY WEST DIVISION 32-45 (1849-95) (copy on file with the author).

²¹ See *Key of the Gulf (Key West, Fla.) 1855-186?*, LIBRARY OF CONGRESS, at <https://www.loc.gov/item/sn84027561/> (indicating that only a few scattered issues have survived the ravages of time and noting that these issues can be found only at the New-York Historical Society and the University of Florida). Crystal M. Toscano, the reference librarian of the New-York Historical Society, was kind enough to photocopy and send these issues to my law school's librarian. See E-mail from Crystal M. Toscano, Reference Librarian, New-York Historical Society, to Dr. Cheryl L. Booth, Associate Director, NSU Panza Maurer Law Library, dated July 20, 2021, at 12:19 p.m. (copy on file with the author).

²² As has been explained elsewhere:

The Key of the Gulf was published for a short period during 1845, and was revived in 1857 [sic], and edited by the brilliant Mr. William H. Ward. It was probably the ablest and one of the most fearless papers ever published in Key West. It was suppressed by Major W.H. French, United States army, early in May, 1861, who wrote: "I directed the mayor to inform the editor (a Mr. Ward) that he was under military surveillance, and that the fact of his not being in the cells of this fort [*i.e.*, Key West's Fort Zachary Taylor] for treason was simply a matter as to expediency and proper point of time." Notwithstanding the fact that Key West was under the control of the Northern forces, Mr. Ward continued to advocate in the columns of his paper the constitutional right of secession. After his paper was suppressed he left Key West and cast his fortune with his native Southland. "Laying aside the weapon of the sage for that of the soldier, to try the issues of law and ethics on the field of battle, whence he never returned."

BROWNE, *supra* note 1, at 141.

²³ These articles are available (for a fee) on Newspapers.com (<https://www.newspapers.com/>), which bills itself as "The largest online newspaper archive[.]" A few of these articles also are available on the Library of Congress's free web site *Chronicling America* (<https://chroniclingamerica.loc.gov/>).

II. THE MURDER

The events leading up to the trial began on June 5, 1859 (some sources say June 3d or 4th) when Morantes departed from Havana, Cuba, in command of the *Enterprise*. His crew consisted of seven men: mate George S. Heirup; a cook (whose name is unknown); and five seamen: Carcer, a Spaniard using the alias “Jaime Collado” who also went by the nickname “Frank”; Eloy, a 22-year-old Frenchman; Ortega, a deserter from the Spanish army; Charles (“Charlie” or “Charley”) Davis; and “Joe” (whose last name is unknown).

This motley band was exactly what the task at hand required. Based on information that would come out later, Morantes had given the crew the following cover story: they were sailing empty because they were going to “New Granada” to pick up a herd of cattle. Consisting primarily of present-day Colombia and Panama, New Granada provided a vague but plausible answer to anyone who might inquire about the *Enterprise’s* intended destination.²⁴

The vessel’s real mission, however, had nothing to do with livestock. As the crew eventually admitted, Morantes had been hired to pick up “a cargo of Indians” in Carthagena (now Cartagena), Colombia, and take them to Havana, where they were to be sold as slaves.²⁵

The voyage apparently got off to a bad start, for within just two days the crew had hatched a plan to kill Morantes. Newspapers later reported that the crew had mutinied because it was unhappy with the ship’s food.²⁶

²⁴ For a history of New Granada, see, e.g., 2 THOMAS CLELAND DAWSON, *THE SOUTH AMERICAN REPUBLICS: PERU, CHILE, BOLIVIA, ECUADOR, VENEZUELA, COLOMBIA, PANAMA* (1904) (explaining, *id.* at 460, that New Granada’s existence as a distinct political entity ended in 1859).

Having a good cover story was especially important for anyone sailing on the *Enterprise*. One year earlier, the vessel had been detained in Havana by Acting U.S. Consul Thomas Savage on suspicion that it was involved in the African slave trade. Following a tense two months, the *Enterprise* finally was permitted to leave Havana after being sold to a new owner. For the details of the standoff, which also involved a ship called the ARDENNES, see *The Slave Trade Brisk in Cuba—Numerous Cargoes Landed*, CHI. DAILY PRESS, Oct. 8, 1858, at 2; *The Case of the Ardennes*, CHARLESTON DAILY COURIER (SC), Oct. 27, 1858, at 1; *News from the West Indies*, N.Y. DAILY HERALD, Nov. 21, 1858, at 1; *Later [News] from Havana*, DAILY PICAYUNE (New Orleans), Nov. 28, 1858, at 1.

²⁵ Slavery was abolished in Colombia in 1851 but remained legal in Cuba until 1886. See ALEXANDER DAWSON, *LATIN AMERICA SINCE INDEPENDENCE: A HISTORY WITH PRIMARY SOURCES* 81 (2d ed. 2015).

²⁶ As has been documented elsewhere, bad food regularly led to mutinies on sailing ships. See, e.g., Michael Hechter et al., *Grievances and the Genesis of Rebellion: Mutiny in the Royal Navy, 1740 to 1820*, 81 AM. SOC. REV. 165, 173 (2016) (reporting that 13% of the mutinies in the British navy were attributable to bad food). See also *Martin v. The William*, 16 F. Cas. 914, 917 (D. Mass. 1819) (No. 9,171) (“‘Though mariners and soldiers,’ says [Charles] Molloy [in his 1676 treatise *De Jure Maritimo et Navali*], ‘have just cause of complaint, as that their victuals or provisions are not good, yet they must not mutiny and rebel, whereby to distract and confound the whole crew, but must make a civil and humble address to their commander, that the same may be amended[.]’”).

By now, the *Enterprise* was off the coast of present-day Pompano Beach (just north of present-day Fort Lauderdale) in South Florida.²⁷ Seeing an opportunity to carry out their plan, the crew decided to ground the vessel.

The scuttling occurred at 2:00 a.m. on June 8, 1859. At daybreak, a fierce struggle ensued that left both Morantes and Joe dead. After a quick burial, the six survivors broke into Morantes's belongings and found 122 "Mexican ounces" worth \$1,952²⁸—the equivalent today of \$57,068.43.²⁹ This money likely was meant to pay for the slaves that the *Enterprise* was supposed to pick up.³⁰

It would take several weeks for these events to become known publicly. The earliest existing account is an unsigned syndicated newspaper report with the dateline "Key West, June 18, 1859":

On the morning of the 17th inst., a boat was seen (by schooner Delaware at anchor at Jupiter Inlet) putting in from the Gulf—came alongside the Delaware and had a crew of six men, who reported themselves a part of the crew of schooner Enterprise, ashore on the beach between Cape Florida [present-day Key Biscayne] and Jupiter Inlet; they stated that the captain of the schooner, named S. [sic] Morantes[,] had fallen overboard one hour previous to the schooner getting ashore, and that in attempting to save him, the vessel drifted in on the breakers and was lost. They acknowledged [having] robbed the trunks after the vessel was lost, but deny that the Captain met his death at their hands. Suspicions are so strong against them that Commissioner Brown [sic] has committed them for trial.

The *Enterprise* was fitted out at Havana for the purpose of transporting a cargo of Indians from Cartagena to Cuba, where they are made slaves of. The trade is exactly similar to the African slave-trade, except that the vessels and men engaged in it run no risk—never being overhauled by cruisers or searched by Custom House officials. The traffic has been going on for some years, and was patronized for a long time by the famous Francisco Marti, the nobleman fisherman of Havana. He used his fishing smacks for the purpose, and stole his Indians from the Yucatan and Campeachy coast.

²⁷ Given Morantes's announced plan to sail from Havana to Cartagena (a south-southeast route), the *Enterprise* never should have been off the coast of any part of Florida (a north-northeast route). This suggests, as one newspaper later pointed out, that Morantes's actual destination was Africa. Either way, the voyage clearly was intended to bring slaves to Cuba, where the demand for them had outpaced the supply for years. See HUBERT H.S. AIMES, A HISTORY OF SLAVERY IN CUBA, 1511 TO 1868, at 248 (1907) ("[T]he price of slaves [in Cuba] rose threefold in 1855 and remained up until after 1860, when further supplies of [Chinese laborers] were brought in.").

²⁸ A "Mexican ounce," also known as a "doubloon," was a large-denomination Mexican gold coin. For a photograph, see <https://perma.cc/ZQ8V-54ZJ>. In 1859, such coins were worth \$16 each in U.S. currency. See *Foreign and Domestic Gold Coins*, DAILY BEE (Sacramento, CA), May 11, 1859, at 2. See also W.W. MILLS, FORTY YEARS AT EL PASO, 1858-1898, at 28 (1901) (giving this same exchange rate).

²⁹ See Friedman, *supra* note 16.

³⁰ Whether the crew knew (or suspected) that Morantes was sailing with such a large sum of money is an open question.

The Enterprise went ashore on the 8th, and drove up high on the beach. She is dry at low water; being an old vessel, we doubt whether the wreckers will attempt to save her.³¹

More details soon were added by a stringer for the *New York Herald*:

The Key West correspondent of the New York Herald, under date of June 29, gives the following account of a shipwreck and the death of a Captain, which looks [to] some like piracy and murder:

³¹ *Interesting from Key West: Arrival of Supposed Murderers!—A New Sort of Slave Trade*, WEEKLY WEST (St. Joseph, MO), July 24, 1859, at 3. Three points in this story require elaboration. First, the schooner *Delaware* was the Jupiter Inlet lighthouse's recently acquired

138-ton schooner-steamer that (exact dimensions aren't known) probably measured around 140 feet in length. . . . In May 1861 the Lighthouse Service tender *Delaware* was moved to the Second District [*i.e.*, Boston] and renamed the *Wave* for the old tender it replaced. The ship was decommissioned in 1879 after its wood hull was judged unfit for sea.

JAMES D. SNYDER, *A LIGHT IN THE WILDERNESS: THE STORY OF JUPITER INLET LIGHTHOUSE AND THE SOUTHEAST FLORIDA FRONTIER* 69, 243 (2006).

Second, the reference to "Commissioner Brown" is a misspelled reference to the previously mentioned Joseph B. Browne. *See supra* note 1. In addition to his clerk of court duties, Browne also served as Key West's U.S. commissioner. As has been explained elsewhere, during this period a U.S. commissioner performed a variety of functions:

For much of the history of the federal courts, commissioners assisted federal judges and provided the federal government with local officers to support the enforcement of specific laws. In 1793 Congress authorized judges of the U.S. circuit courts to appoint "discreet persons learned in the law" to take bail in federal criminal proceedings. The statute allowed officers of the federal courts to assume responsibilities that the Judiciary Act of 1789 had vested in local magistrates and justices of the peace. In 1812 Congress authorized these court-appointed federal officers, who were no longer required to have legal training, to take affidavits in cases brought in the circuit courts. An act of 1817 referred to the officers as "commissioners" and authorized them to set bail, to take affidavits in civil cases brought in the district courts, and to take the depositions of witnesses who were unable to appear in federal court. In an 1842 act, Congress granted commissioners the same authority over federal criminal processes as it formerly had granted to state court magistrates and justices of the peace, including the power to arrest and imprison the accused.

Court Officers and Staff: Commissioners, FEDERAL JUDICIAL CENTER, at <https://www.fjc.gov/history/administration/court-officers-and-staff-commissioners>. For a further discussion, see SURRENCY, *supra* note 2, at 499-509.

Third, as matters turned out, wreckers were able to salvage the contents of the *Enterprise*. Eventually, these "materials [were] sold by the U.S. Marshal for \$133.13." *Later [News] from Key West*, DAILY DELTA (New Orleans), July 30, 1859, at 1.

The United States revenue cutter William [sic] Appleton, Lieut. Com. Randolph, arrived [in Key West] on the 26th inst., from a cruise to the southeast coast of Florida. She brings the mate and two [sic] seamen of the schooner Enterprise, of New Orleans, lost on the 8th, on Hillsboro' Inlet. The men are charged with the murder of Capt. Moriantes [sic], and the robbery of his trunks, and of running the vessel ashore after throwing the captain overboard.

They say that the vessel was bound from Havana to Carthagen, and that she was to bring a cargo of Indians, who were to be sold as slaves on their arrival at Havana; that when off Hillsboro' Capt. M. accidentally fell overboard, and that while they were endeavoring to raise him the schooner struck [the reef]; that they, on finding the vessel would be a wreck, were obligated to abandon the captain to his fate; and that after getting the movables from the vessel ashore, they broke open the captain's trunk, took the specie and divided it equally among them.

At Jupiter Inlet they saw the United States schooner Delaware, and were taken on board. To Capt. Owen [actually Owens] they said nothing about the robbery of the money, but told the story of the Captain's death, and the vessel's loss. One of Capt. Owen's crew discovered a belt heavily loaded with money upon the person of one of them, and reported the fact. They were not arrested until Lieut. Randolph came up with his cutter, when Capt. Owen gave them into his charge, excepting two, who, fearing they were suspected of crime, had at night taken their boat and made their escape.

There are several very suspicious circumstances about the affair, which lead the authorities here to believe that murder as well as robbery has been committed. Commissioner Browne has had an examination and committed them for trial. Lieut. Randolph searched the men after the arrest, and found over \$1000 in gold secured upon them. The two who escaped have gone up the West coast, and will no doubt be overhauled, as the cutter is on their track.³²

³² *Supposed Piracy and Murder*, BANGOR DAILY WHIG & COURIER (ME), July 16, 1859, at 2 (paraphrasing slightly altered for improved readability). Four points in this story require additional comment. First, as has been explained elsewhere, the revenue cutter *John* (not William) *Appleton* was a "small schooner sent to Key West, FL in February 1858 under Lieutenant William Randolph[,] Appleton was turned over to the Navy [on April 11, 1861] and used as a tender to USS R.R. Cuyler. She ran aground and burned in Tampa Bay in August 1861." *Appleton (John Appleton)*, 1858, UNITED STATES COAST GUARD HISTORIAN'S OFFICE, Apr. 15, 2020, <https://www.history.uscg.mil/Browse-by-Topic/Assets/Water/All/Article/2151574/appleton-john-appleton-1858/>.

Second, William B. Randolph (1825-83) was, as the story reports, a lieutenant in the U.S. Revenue Marine Service ("RMS"). Originally from Virginia, he was married and lived in Key West. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE EIGHTH CENSUS OF THE UNITED STATES: 1860 (1864) (Page 35, Lines 16-17 of Schedule 1.—Free Inhabitants in the City of Key West, in the County of Monroe, State of Florida, enumerated Aug. 4, 1860). After the Civil War, he moved to Cooperstown, New York,

On July 2, 1859, the *Key of the Gulf* provided its own account of the crew's arrest:

On the 26th of June, the U.S. revenue cutter John Appleton, Lieut. Com. Wm. B. Randolph, returned to [Key West] from a cruise along the reef, bringing four of the crew of the schooner Enterprise, fallen in with at Cape Florida, and who were suspicioned with having murdered their captain.

The four men being arrested and brought before U.S. Commissioner J.B. Browne, for examination, it was ascertained that the schooner Enterprise, Capt. B.A. Morantes, sailed from Havana about the 4th or 5th of June, bound to Carthagena, New Granada, for cattle. On the third or fourth day after leaving Havana, a dispute arose between some of the crew and Capt. Morantes with regard to the [ship's] provisions. On that occasion one of the crew was heard to say: "Never mind, it will all be right soon."

A day or two after this, the vessel was run ashore near Hillsborough, as it is believed intentionally, and the master most horribly murdered. It was stated that the vessel first struck the reef about 2 o'clock in the morning, (about the 8th of June,) and by daylight had drifted broadside on to the beach, so near, that it was not difficult to get ashore without a boat. About 7 o'clock two of the men—the cook and a Spaniard called Jose Maria—asked permission of Capt. Morantes to go along the beach to see if a settlement could be found, to which he consented, and they left.

Soon afterward, three others of the crew—called Charlie, Frank [*i.e.*, Carcer] and Joe—went to the captain and asked permission to take the foresail out of the schooner and go on shore and put up a tent, to which he also assented. After the tent had been erected, the same three men

where he spent the remainder of his life. See *William B. Randolph*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/118289731/william-b.-randolph>. At the time of his death, he still was working for the RMS. See 1 U.S. DEPARTMENT OF THE INTERIOR, OFFICIAL REGISTER OF THE UNITED STATES: CONTAINING A LIST OF THE OFFICERS AND EMPLOYÉS IN THE CIVIL, MILITARY, AND NAVAL SERVICE ON THE FIRST OF JULY, 1883, at 217 (1883).

Third, as would be reported later, the meeting between the *Delaware* and the *John Appleton* occurred off Cape Florida (as previously explained, present-day Key Biscayne, just south of present-day Miami). This suggests that after rescuing the *Enterprise*'s crew, the *Delaware* was in the process of taking the men to Key West (presumably for repatriation to Havana) when Captain Owens began to doubt their story and flagged down the *John Appleton*.

Fourth, as has been pointed out elsewhere, nothing is known about Captain Owens (not even his first name). See SNYDER, *supra* note 31, at 92 ("Except for a few names that surfaced in reports—Beard, Woolfkill, Smith, Myers, Owens, the Patterson brothers—none [of the U.S. Lighthouse Service's employees] . . . would leave a trace of himself in the National Archives.").

returned to the schooner and asked permission to carry the provisions ashore. Capt. Morantes objected, saying that a vessel might come along at any moment and they could all go on board. This they seemed not to like, and after going forward, cursing among themselves, again returned to the Captain, when Charlie struck him with his fist. The Captain clinched him, and while in that position, Frank stepped up behind the Captain and stabbed him in the temple. He and Charlie then threw him overboard.

The Captain, being only wounded, endeavored, by keeping close under the vessel, to get out of the sight of his pursuers; but whenever his head would appear, they would throw iron pots or anything they could find at him. He then went out into deep water, but did not remain there long, before he approached the beach, with his hands crossed on his breast, begging them to spare him.

Frank went out in the water to meet him, giving him to understand at the same time that he would not further molest him, but as soon as he got to him he again stabbed him in the head; the Captain again went back into deep water. Charlie, Frank, and Joe then went on board of the vessel and lowered the stern-boat, and proceeded for the Captain, but the sea being rough, they capsized. Charlie and Frank jumped out, but Joe was caught under the boat and drowned.

Captain Morantes, with his hands crossed as before, came towards Charlie and Frank, begging them to spare him; but as soon as he got up to them, Frank stabbed him with a knife, and Charlie beat him over the head with an iron pump brake until he was dead. They then dragged him ashore and buried him, leveled the sand over the grave, and covered it with grass. They then got Joe's body, which was still under the boat, and buried it also.

After this they broke open the Captain's trunk and took out his money, in all about \$1,800, and divided it among the crew, Charlie and Frank retaining the largest portion for themselves. After this, they all took to the boat, and proceeded up the coast until they fell in with the U.S. Light-house schooner Delaware.

They went on board [the Delaware], and after being there a few days Capt. Owen [sic] had good reason to believe that all was not right, and he arrested and sent them to Key West by the U.S. revenue cutter John Appleton. Previous to the arrest, Charlie and the cook made their escape in the [Delaware's] boat. Capt. Owen (Deputy Marshal for the occasion) is in pursuit of them with the Delaware, and it is to be hoped they will be caught and brought to punishment for this cold-blooded, horrible murder. They will all be committed for trial at the next term of the Court.

Capt. Morantes, the murdered Captain, was well known in this city and was a French Creole, a native of Louisiana, and was evidently bound for the coast of Africa.³³

In its July 9, 1859, issue, the *Key of the Gulf* printed the following correction to its previous reporting:

In an article last week giving an account of the loss of the schooner *Enterprise* and the murder of Capt. Morantes, we stated that the schr [sic] *Delaware* had gone in pursuit of the [two] fugitives [*i.e.*, Davis and the cook], but this was a mistake. It was the U.S. schooner *Florida*, which went as far as Tampa but heard nothing more of them.

This morning, by order of the Court, [U.S.] Deputy Marshal [Frederick] Filer left for the scene of the wreck in the Revenue cutter *John Appleton*, for the purpose of disinterring and examining the body of Captain Morantes.³⁴

Elsewhere in the same issue, the *Key of the Gulf's* readers discovered a much more shocking piece of news—Heirup (the mate) was dead:

[Died], [i]n this city, on the 9th inst., of Pulmonary Consumption [*i.e.*, tuberculosis], Mr. GEORGE S. HEIRUP, late mate of the schooner *Enterprise*. Mr. H. was on board of this vessel at the time of her wreck on the Eastern coast of Florida, near Hillsborough Inlet, and of the murder of her master [Morantes], by a part of her crew; but not a witness to this brutal and unprovoked affair.

He arrived here in very feeble health on the 26th of June, in company with others of the crew of the *Enterprise*, and was held in custody . . . until the charge against them could be investigated by the U.S. Commissioner [Browne]. We are pleased to state that in the examination before the Commissioner, the testimony produced entirely exonerates Mr. HEIRUP from any participation or knowledge of this outrageous act; and so well satisfied was the Commissioner of his innocence, that he was only held here as a witness, to give testimony in behalf of the United States, at the November Term of the Court.

³³ *Murder, Robbery, and Shipwreck—From the Key of the Gulf, July 2*, N.Y. TIMES, July 14, 1859, at 8 (paraphrasing slightly altered for improved readability). This article is reproduced in full, without comment, in STEVEN D. SINGER, SHIPWRECKS OF FLORIDA: A COMPREHENSIVE LISTING 143, 282-83 (2d ed. 2011).

³⁴ *Correction*, KEY OF THE GULF (FL), July 9, 1859, at 2. Filer (1812-80) was born in Alsace, France. See *Frederick Filer*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/50026550/frederick-filer>. The 1860 federal census lists him as widowed with four children and indicates that he is a “shoemaker,” which suggests that he worked only part-time as a deputy marshal. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE EIGHTH CENSUS OF THE UNITED STATES: 1860 (1864) (Page 40, Lines 6-10 of Schedule 1.—Free Inhabitants in the City of Key West, in the County of Monroe, State of Florida, enumerated Aug. 7, 1860).

Mr. HEIRUP we believe was a native of Belfast, Maine, where we learn he leaves a wife and family. It will be a satisfaction to them to know that although among strangers, he was kindly cared for by the officers who had [him] in [their] charge, and that his remains were followed to their last resting place by many of our good citizens.³⁵

On July 11, 1859, Mariano Alvarez, Spain's consul at Key West, briefed his superiors on the case:

The American coast guard cruiser *Appleton* arrived in Key West with four prisoners from the American schooner *Enterprise*. The schooner's captain, V.A. Morantes, left Havana on June 4 bound for Cartagena, Nueva Granada. The crew of the *Enterprise* ran the schooner aground near Hillsborough on June 8. Two or three of the crew members killed Captain Morantes and stole \$1,800 from his trunk. The instigators of the crime used some of the money to bribe the other crew members, who [then were] swor[n] to secrecy.

Two Spanish crew members were arrested for the murder of Captain Morantes. One of the prisoners is J.M. Ortega, a native of Spain who was brought to Key West. He claims he is innocent of any wrongdoing and says he never was aboard [*i.e.*, atop] the *Enterprise*. Ortega is twenty years old and lives in Havana. When questioned, he said he did not know who had killed the captain because he was below deck during the murder.

The other prisoner says his name is Jaime Collade [sic] [*i.e.*, Carcer], but I do not think this is his real name. He stated that he was from Alicante [in eastern Spain], but his accent sounds like he is from Andalusia [in southern Spain]. He may be one of the ringleaders of the mutiny.

The authorities are searching for the body of the captain buried somewhere along a beach in Hillsborough. Captain Morantes was popular among the residents of Key West. He was a native of France [sic] and a Creole from Louisiana. He leaves a wife and children [sic] in New Orleans.³⁶

In its July 14, 1859, issue, the New Orleans *Daily Picayune* published its own version of the gruesome events:

³⁵ *Died*, KEY OF THE GULF (FL), July 9, 1859, at 2 (paragraphing slightly altered for improved readability). See also OFFICE OF THE SECRETARY OF THE INTERIOR, THE EIGHTH CENSUS OF THE UNITED STATES: 1860 (1864) (Page 1, Line 31 of Schedule 3.—Persons who Died during the Year ending 1st June, 1860, in [the Town of] Searsport in the County of Waldo [in the] State of Maine, enumerated by [the] Ass't Marshal) (indicating that Heirup, a 34-year-old married sailor originally from Denmark, died after being sick for three weeks).

³⁶ CONSUELO E. STEBBINS, CITY OF INTRIGUE, NEST OF REVOLUTION: A DOCUMENTARY HISTORY OF KEY WEST IN THE NINETEENTH CENTURY 144 (2007) (paragraphing slightly altered for improved readability).

The supposed murder of Capt. Moriante [sic], of the schooner Enterprise, and a native of New Orleans, has been proved too true by the confessions of the mate and one of the crew. All the murderers but two are in custody. By the confession of Gileos [sic] Faustina [sic] Elole [sic], a Frenchman and one of the seamen, the captain was murdered after the vessel had been run on shore. After the murder, one of the crew was drowned by the upsetting of a boat.

The men have been examined by the U.S. Commissioner, J.B. Browne, Esq. In the absence of the District Attorney[, J.L. Tatum, Esq.,] the United States was represented by W.C. Maloney, Esq. The examination was a lengthy one and we are unable to give it verbatim. It seems, however, that some dispute had occurred on the voyage about provisions, and ill feeling prevailed. The vessel was run ashore by one of the disaffected ones.

Sometime after striking [the reef], three of the men demanded permission to go ashore and take a sail to build a tent, but asking also for provisions, they were denied and a scuffle ensued in which the captain was stabbed and then thrown overboard. He was not killed outright, but recovered and got under the stern of the vessel, but was soon drawn thence and out into deep water. The murderers followed him in the boat, and after repeated stabs and strokes upon the head with an iron pump brake he was dispatched. His body afterwards coming on shore, was buried. The men then broke open his trunk, divided about \$1800 among themselves and thence in the boat left the wreck.

They fell in off Cape Jupiter with the U.S. schooner Delaware, from which two of the party afterwards escaped. The rest were arrested by Lieut. Randolph, of the Revenue cutter Appleton, and brought to [Key West]. They will be tried in November.³⁷

In its July 23, 1859, issue, the *Key of the Gulf* reported that Morantes's body, as well as Joe's, had been located:

The Key West Key of the Gulf of the 23d ult. announces that the health of that place is good and the weather delightful. The same paper gives the following account of the examination and burial of Capt. Morantes, of the schooner Enterprise, who was barbarously murdered recently by his crew:

The United States revenue cutter, John Appleton, Lieutenant Commanding [sic] Wm. B. Randolph, arrived on the night of the 21st inst., from the wreck of the schooner Enterprise, ashore "high and dry" on the beach, forty miles north of Cape Florida lighthouse.

³⁷ *Later [News] from Key West—Murder of Capt. Moriante [sic], of the Schooner Enterprise—[Special Correspondence of the Picayune], Key West, July 9, 1859, DAILY PICAYUNE (New Orleans), July 14, 1859, at 5 (paraphrasing slightly altered for improved readability).*

In our issue of the 2d inst., we gave an account of the running ashore of this vessel and the murder of her captain (B.A. Morantes) by a part of the crew, which one of them [Eloy], a Frenchman by birth, described before the United States Commissioner; and on the 9th we stated that Lieut. Randolph and Deputy Marshal Filer, with the Frenchman, had started for the scene of the murder for the purpose of examining the body of Capt. Morantes, etc., and we now announce their return after having accomplished the object of the mission.

Lieut. Randolph informs us that the witness fully sustained the evidence he gave before the Commissioner, by going directly to the graves. The seaman's (Joe) was in the usual form, with head and footboards; the Captain's was levelled and smoothed over and covered with grass-sod. On opening it the body was found in a perfectly nude state, the face about twenty inches below the surface and the knees six or eight; the body had evidently been forced into a hole much too short for it, as it was contracted and distorted. The body was recognized as that of B.A. Morantes, by both Mr. Filer and Lieut. Randolph, to whom he was well known.

They found behind the lower part of the right ear a gash which had been made apparently with a knife, extending to the collar bone, and about three inches deep; right eye cut; skull not broken, but the head had the appearance from the blood shot condition of the veins to have received some hard blows; one upper tooth on the right side of the mouth gone. The lower part of the body, which was placed uppermost in the grave, was so much decomposed that no traces of violence could be distinguished on the same.

Lieut. Randolph and Deputy Marshal Filer re-interred the body, giving it the rites of Masonic burial.³⁸

On August 6, 1859, Alvarez (the Spanish consul) again briefed his superiors on the case:

A French sailor [Eloy], who was a crew member on the *Enterprise*, testified that he knew where Captain Morantes's body was buried. The sailor was taken on a coast guard cutter to the scene of the crime in Hillsborough. The authorities also located the body of a sailor named Joe

³⁸ *Examination of the Body of Capt. Morantes*, NEW ORLEANS DAILY CRESCENT (LA), Aug. 5, 1859, at 2. By 1859, numerous Masonic lodges were operating in Florida and Louisiana and it is possible that Filer, Morantes, and Randolph were all members. See HISTORY OF THE ANCIENT AND HONORABLE FRATERNITY OF FREE AND ACCEPTED MASON, AND CONCORDANT ORDERS 305-06 (discussing Florida's chapters) and 334-40 (discussing Louisiana's chapters) (Henry Leonard Stillson ed., 1891). As has been explained elsewhere, there is no comprehensive listing of past Masons, so it is impossible to test this hypothesis. See *Where Can I Find Masonic Records?*, GENEALOGY TODAY, at http://www.genealogytoday.com/genealogy/answers/Where_can_I_find_Masonic_records.html ("Unfortunately, there is no central repository for Masonic membership information, and no 'one' place to check online.").

who had drowned when he was washed aboard by heavy seas during the mutiny.

When the coast guard officials arrived at the beach, the French sailor pointed out the site where Captain Morantes had been buried, and they dug up his body. The captain of the coast guard cutter inspected the corpse and noted in his report that Captain Morantes had been stabbed several times with a knife and his throat had been cut. Captain Morantes had a number of bruises on his head and body from a severe beating. Owing to the state of his body's decomposition, the officials present decided to rebury him at that same site according to Masonic rites.

One of the prisoners [Heirup], a warrant officer from the *Enterprise*, died in jail, and two other criminals [Davis and the cook] have not been captured yet. The two Spanish sailors [Carcer and Ortega] who were implicated in the crime are in jail here, and one will probably be hanged.³⁹

On the same day that Alvarez sent his report to his superiors, Joseph T. Crawford, Great Britain's Acting Consul-General in Havana, forwarded the following note to Lord John Russell, Great Britain's newly installed Secretary of State for Foreign Affairs:

The schooner "Enterprize," [sic] which sailed from this port on the 3rd of June last, was run ashore on the coast of Florida by the crew, who murdered the Master and plundered the vessel, but some of them, who had proceeded in a boat to a lighthouse vessel, representing themselves as shipwrecked seamen, were arrested and sent for trial to Key West by the United States' revenue-cutter "John Appleton."⁴⁰

III. THE GRAND JURY

On September 30, 1859, Marvin issued an order commanding two dozen local citizens to come to the U.S. courthouse on Monday, November 7, 1859, for possible appointment as grand jurors.⁴¹ On October 31, 1859, U.S. Marshal Fernando J.

³⁹ STEBBINS, *supra* note 36, at 144-45. Unfortunately, there are no further letters from Alvarez, who left Key West just before the trial started:

Our Key West correspondent, writing on the 6th November, says:—Mariano Alvarez, Consul of Spain at this port, has been appointed Consul General and Charge d'Affairs de la Republica Espanola de Santo Domingo. The Captain General of Cuba has sent a Spanish government steamer to take Mr. Alvarez to his destination. She arrived this morning from Havana.

Personal Intelligence, N.Y. HERALD, Nov. 15, 1859, at 1.

⁴⁰ 70 ACCOUNTS AND PAPERS OF THE HOUSE OF COMMONS 162 (1860) (under "No. 205").

⁴¹ See GENERAL MINUTES, *supra* note 20, at 32 (citing Benjamin Albury; John Baker;

Moreno⁴² advised Marvin that all but one of the 24 had been located and served with a summons to appear.⁴³

At 10:00 a.m. on November 7th, with Marvin on the bench, Moreno called the list, and 19 of the 24 answered “present.”⁴⁴ After Richard R. Roberts was excused,⁴⁵ the names of the remaining 18 were placed in a hat and drawn one by one.⁴⁶ The first name to come out was Daniel Davis, who was designated the foreman.⁴⁷

On the following day (November 8th), Marvin excused four of the grand jurors from further service.⁴⁸ Carcer and Eloy then were brought into the courtroom and

Richard Barthum; John Curry, Jr.; John W. Curry; William Curry, Jr.; Daniel Davis; Henry Demeritt; William Demeritt; Joseph Ingraham; Thomas Johnson; John Knowles; William W. Knowles; John Lowe, Jr.; William B. Lowe; William C. Lowe; Whitmore Pinder; James Riggs; Joseph Roberts; Richard R. Roberts; William A. Russell; Philip Sawyer; John Skilton; and John White).

⁴² As Browne reports, see *supra* note 1 at 56, 175, Moreno (1823-1905), a native of Pensacola, was primarily a merchant, although throughout his life he held a variety of political positions and served one term (1852-53) as Key West’s mayor. Upon his death, one newspaper eulogized him by writing:

The early history of Key West is replete with reminiscences of Col. Moreno. He came here a mere youth and for over half a century was identified with every movement for the upbuilding of Key West. Mr. Moreno was at one time mayor of Key West; and for many years vice-consul for Great Britain, France, Germany and Spain, and as such represented all other powers. Under Buchanan’s administration he served as United States marshal of this district. He was a polished gentleman and one whom it was a pleasure to meet, whether in a business or a social way.

In respect to his memory the flags on the city building and in many prominent places were placed at half mast Monday. The deceased was 83 years old. . . .

Island City News and Notes, DAILY MIAMI METROPOLIS (FL), Nov. 23, 1905, at 9. See also *Fernando Joaquin Moreno*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/45136643/fernando-joaquin-moreno>.

⁴³ See GENERAL MINUTES, *supra* note 20, at 32 (explaining that “William B. Lowe . . . cannot be found.”).

⁴⁴ *Id.* at 33 (listing those present as Benjamin Albury; John Baker; Richard Barthum; John Curry, Jr.; John W. Curry; William Curry, Jr.; Daniel Davis; William Demeritt; Joseph Ingraham; John Knowles; William W. Knowles; John Lowe, Jr.; William C. Lowe; James Riggs; Joseph Roberts; Richard R. Roberts; William A. Russell; Philip Sawyer; and John White).

⁴⁵ *Id.* The minutes do not explain why Roberts was excused.

⁴⁶ *Id.*

⁴⁷ *Id.* Once the first slip was pulled from the hat (to determine who would serve as foreman), there appears to have been no reason to keep pulling slips. The minutes do not shed any light on why they continued to be pulled.

As has been explained elsewhere, Davis (1813-68) was one of Key West’s best-known carpenters. See SHARLA M. FETT, RECAPTURED AFRICANS: SURVIVING SLAVE SHIPS, DETENTION, AND DISLOCATION IN THE FINAL YEARS OF THE SLAVE TRADE 85 (2017). See also *Daniel Davis*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/94357492/daniel-davis>.

⁴⁸ See GENERAL MINUTES, *supra* note 20, at 34 (excusing William Curry, Jr.; John Knowles;

explained that they did not have counsel.⁴⁹ In response, Marvin appointed Bethel and Douglas as the pair’s lawyers and adjourned the grand jury until Thursday, November 17th.⁵⁰

On Saturday, November 12th, Carcer and Eloy were back in court. While Eloy pleaded “not guilty” to the charges against him, Carcer’s indictment was quashed because of the confusion surrounding his identity.⁵¹ The men then were sent back to their cells.⁵²

On November 17th, the grand jury returned indictments for murder against Carcer and Eloy.⁵³ Both immediately entered pleas of “not guilty.”⁵⁴ With these formalities over, Marvin adjourned the proceedings and ordered the trial to begin at 9:00 a.m. on the following Monday.⁵⁵

By now, it was obvious that the trial would be proceeding without Morantes’s actual killer (*i.e.*, Charlie Davis). As a result, the case’s style was changed from *United States v. Carcer, Eloy, and Davis* to *United States v. Carcer and Eloy*.⁵⁶

IV. THE TRIAL

On Monday, November 21st, Carcer and Eloy’s trial began with jury selection.⁵⁷ After interviewing 55 potential jurors, a 12-man panel was seated.⁵⁸ Next, Peter Crusoe was “sworn as Interpreter for the Court, Jury, bar and witness[es]”;⁵⁹ three bailiffs

William W. Knowles; and James Riggs). The minutes do not indicate why the quartet was excused.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 35.

⁵² *Id.*

⁵³ *Id.* at 35-36.

⁵⁴ *Id.* at 36.

⁵⁵ *Id.*

⁵⁶ Compare *id.* at 35 with *id.* at 37.

⁵⁷ *Id.* at 36.

⁵⁸ *Id.* at 36-37 (listing the names of the petit jurors as William Albury; Daniel Bell; Benjamin Bethel; Christian Boye; John Gardner; Richard Ingraham; William G. Johnson; Henry Ogden; Joseph Roberts; Frederick Sawyer; Henry Weatherford; and James Weatherford, Jr.). The jury’s foreman was Boye. See *id.* at 39.

Boye (1810-c. 1865), originally from Germany, was one of Key West’s more successful merchants as well as one of its most notable slaveowners. Today, he is remembered chiefly for the angry letter he wrote in 1862 to his teenage son Frank. In it, Boye decried the treatment meted out by Union soldiers to Southern sympathizers. See WILLIAM CAMERON BARNETT, FROM GATEWAY TO GETAWAY: LABOR, LEISURE, AND ENVIRONMENT IN AMERICAN MARITIME CITIES 283 (2005). See also Michael Boonstra, *Titusville’s Pritchard House*, MICHAEL’S GENEALOGY & BREVARD COUNTY HISTORY BLOG, May 6, 2011, at <http://mylibraryworld-michaelb.blogspot.com/2011/05/>.

⁵⁹ GENERAL MINUTES, *supra* note 20, at 37. Crusoe (1820-73) originally was from Gibraltar, which explains how he knew both English and Spanish. (Although England wrested control of Gibraltar from Spain in 1704, the territory’s location at the tip of the Iberian Peninsula means that even today, “Gibraltarians are almost all bilingual.” KEITH AZOPARDI, SOVEREIGNTY AND THE STATELESS NATION: GIBRALTAR IN THE MODERN LEGAL CONTEXT 147 (2009).)

The only source that I have been able to find—which, because it is anonymous

(E.A. Coste, H.B. Dailey, and William Fine) were appointed “to attend the Jury”;⁶⁰

may not be wholly reliable (it is, however, heavily footnoted)—summarizes Crusoe’s life as follows:

Peter A. Crusoe was born ca. 1820 at Gibraltar. He married Sarah A. Roberts prior to 1858, and was a Clerk of the Circuit Court at Key West, Florida, from 1851 to 1861. He was appointed as one of two secretaries assigned to record a meeting held on December 12, 1860, for the purpose of nominating delegates to the State secession convention to assemble in Tallahassee on the third day of January, 1861. In May 1861, he departed Key West and went to Tampa. He was mustered into service as a seaman on December 1, 1861, with Captain Henry Mulrenan’s Florida Volunteer Coast Guards. He remained in this unit until mustered into Confederate service on April 25, 1862, when he was enlisted as a private in Captain Smith’s Company (Key West Avengers), 7th Regiment Florida Infantry by Major R.B. Thomas at Tampa, Florida, for a period of 3 years or the war. He was discharged by . . . Thomas very soon after (the reason stated is illegible in the records). According to Robert Watson’s diary, Crusoe is known to have returned to Tampa, and apparently engaged in business until Tampa was occupied by . . . Federal forces on May 6, 1864; he was taken into custody for refusing to take the oath of allegiance. After the war, he returned to Key West, where he again served as Clerk of the Circuit Court at Key West, Florida, from 1865 to 1868. He died at Key West on March 5, 1873.

Company K, 7th Florida Infantry Regiment, MILITARY WIKI, at https://military-history.fandom.com/wiki/Company_K,_7th_Florida_Infantry_Regiment. See also *Peter A. Crusoe*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/64253778/peter-a-crusoe>.

⁶⁰ GENERAL MINUTES, *supra* note 20, at 37.

In the 1860 federal census, Coste, whose first name was Edgar, is shown as having been born about 1819 in South Carolina; single; and serving as the sheriff of Monroe County. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE EIGHTH CENSUS OF THE UNITED STATES: 1860 (1864) (Page 51, Line 12 of Schedule 1.—Free Inhabitants in the City of Key West, in the County of Monroe, State of Florida, enumerated Aug. 14, 1860). See also BROWNE, *supra* note 1, at 212 (noting that Coste served as Monroe County’s sheriff from 1858 to 1861).

Dailey, whose first name was Hiram, see *id.* at 221, also appears in the 1860 federal census. It indicates that he was born about 1799 in Virginia; is married with one child; and is a carpenter. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE EIGHTH CENSUS OF THE UNITED STATES: 1860 (1864) (Page 3, Lines 18-20 of Schedule 1.—Free Inhabitants in the City of Key West, in the County of Monroe, State of Florida, enumerated July 27, 1860). Another source reports that Dailey served briefly (Aug. 19-Oct. 8, 1814) as a private in the War of 1812 and died in Key West in 1867. See *U.S., War of 1812 Pension Application Files Index, 1812-1815 for Hiram B Dailey*, available at https://www.ancestry.com/imageviewer/collections/1133/images/miusa1814_114126-00433?usePUB=true&_phsrc=KTc743&_phstart=successSource&usePUBJs=true&pId=107398. In their later years, Dailey worked as a steward, and his wife Martha worked as a matron, at the U.S. Marine Hospital Service in Key West. See REGISTER OF OFFICERS AND AGENTS, CIVIL, MILITARY, AND NAVAL, IN THE SERVICE OF THE UNITED STATES ON THE THIRTIETH SEPTEMBER, 1865, at 70 (1866) (indicating that Dailey’s salary was \$300 a year and Martha’s was \$200 a year).

the jurors were “charged . . . as to their duty”;⁶¹ and U.S. Marshal Moreno was ordered to “furnish the Jury and Bailiffs with their meals.”⁶² The proceedings then were adjourned to the next day.⁶³

The trial lasted two days (November 22nd-23rd), at the end of which the jury, after three hours of deliberation, found both Carcer and Eloy guilty.⁶⁴

In its December 10, 1859, issue, the *Key of the Gulf* published a detailed summary of the trial. Although most of the testimony confirmed what already had been reported by the press, the trial helped to straighten out the case’s timeline:

During the last session of the Grand Jury of this place, a bill of indictment was found by them against ALEJANDRO CARCER and GUILLOT FAUSTIN ELOY, part of the crew of the American schooner *Enterprise*, charging them with the murder of B.A. MORANTES, captain of said schooner.

Their trial commenced on Monday the 21st of November last, before the U.S. District Court, Judge WM. MARVIN presiding.

For the prosecution appeared the District Attorney, Mr. JOHN L. TATUM, assisted by Mr. WALTER C. MALONEY. For the defense, Messrs. S.J. DOUGLAS and WINER BETHEL.

The first and principal witness brought forward by the prosecution, was Jose Maria Ortega, who testified as follows:

Is 21 years of age. Was born in old Spain, belonged to the Spanish army in Cuba, from which he deserted, secreting himself on board the schooner *Enterprise*, then lying in the harbor of Havana. She sailed from thence on the 5th of June last, at which time there were on board eight persons in all, viz: Capt. Morantes, the mate [*i.e.*, Heirup], and crew, consisting of Charlie, Joe, Alejandro [*i.e.*, Carcer], Guillot [*i.e.*, Eloy], the cook and himself the witness.

Fine (c. 1816-96) was born in the Bahamas. The 1860 federal census lists him as married with five children and states that he is Key West’s city watchman. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE EIGHTH CENSUS OF THE UNITED STATES: 1860 (1864) (Page 10, Lines 15-21 of Schedule 1.—Free Inhabitants in the City of Key West, in the County of Monroe, State of Florida, enumerated July 30, 1860). Fine’s *Find-A-Grave* page incorrectly spells his last name “Fino.” See *William Fino*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/184681563/william-fino>.

⁶¹ GENERAL MINUTES, *supra* note 20, at 37.

⁶² *Id.* at 37, 45.

⁶³ *Id.* at 37.

⁶⁴ *Id.* at 39. See also *infra* text accompanying note 65 (indicating that the jury deliberated for three hours). Sometime after the trial (the minutes do not give a specific date), Marvin ordered the government to pay the grand jurors a total of \$164, and the petit jurors a total of \$196, for their respective services. See GENERAL MINUTES, *supra* note 20, at 44. Marvin also ordered the government to pay the witnesses a total of \$251.80 for their attendance. *Id.*

At about 2 o'clock in the morning of the third day out, the vessel ran ashore on the coast of Florida. At daylight, witness and cook went ashore to look for houses. Returned soon after, unsuccessful. After breakfast while they were all seated on deck, Charlie rose and asked of the mate permission to kill the captain. The mate shrugged his shoulders and went below. Charlie then went behind the captain, who was seated on the binnacle [a waist-high stand housing the ship's compass], and with his open hand slapped him on the cheek. Alejandro then attacked him with a knife, cutting him severely over the temple. Joe and Guillot then took the captain up, and threw him overboard. They then all went ashore.

Joe and Guillot soon return[ed] on board [and] threw some iron pots at the captain in the water; one of which struck him on the head. The captain, however, continued swimming, dodging from one side of the vessel to the other to avoid the blows. Soon after Charlie and Alejandro returned on board. Alejandro said, "If you wish to kill the captain, why kill him at once!" The captain begged for his life, telling Joe to remember that he (Joe) had a wife and children as well as himself.

They then lowered a boat; Joe, Charlie and Guillot got in, and pushed off in pursuit of the captain, who now began to swim out towards the deep sea. The boat had scarcely left the ship, when she was capsized [by] a heavy sea; Charlie and Guillot saved themselves, but Joe being caught underneath the boat, was drowned. Then Guillot taking a rope made a noose in it, and threw it at the captain, that he might catch him, but did not succeed. Soon after, Charlie, taking in his hand a stick of wood, called a pump-brake, waded into the water, and on reaching the captain, struck him several heavy blows on the head; then taking him by the arm, he pulled him ashore, dead. He was immediately buried by the cook and himself (the witness), the grave having been already dug.

Charlie, Guillot and Alejandro then drew Joe out from under the boat, took him ashore and rolled him in a barrel, trying to bring him to, but to no purpose—he was dead. All remained that day ashore, having brought provisions from the vessel. The next morning, the mate, (who during the scene of the murder, had been shut up in the cabin,) came ashore, and recommended them to bury Joe. They did so, the mate accompanying, and ordering them to take off their caps, while he read prayers. The next day Alejandro broke open the captain's trunk, and of the money he there found, gave each man fourteen gold doubloons.

About eight days after, they all put to sea in the boat, cruised about three or four days and were picked up by the U.S. schooner Delaware.

The second witness called, was Charles R. Cook, who testified that he was then mate and navigator of the U.S. schooner Delaware. While lying off Jupiter, picked up six men in a boat, who reported themselves as the mate, cook, and four seamen, belonging to the schooner Enterprise. They said that the captain of said schooner had been knocked overboard by the main-boom, and drowned; the schooner afterwards ran ashore. They then

delivered the papers of the Enterprise to the captain of the Delaware. At evening we got underweigh [sic—now spelled “underway”] and started for Cape Florida. Next day [we] arrived at the wreck, which they pointed out. She lay broadside to the beach, with sand so banked up on the inside, that I could walk ashore. [We] [t]ook on board [the] captain’s trunk, chronometer and other things belonging to the vessel. A day or two after two of the men, viz., Charlie and the cook, stole a boat from the schooner and escaped. This aroused suspicion. We searched the rest, and found fourteen doubloons on each. Then got irons from on board the Revenue cutter [John Appleton] lying at Cape Florida, and ironed them. Two days after delivered them into the charge of Lieut. Randolph commanding said Revenue cutter, by whom they were brought to Key West.

Next witness was Lieut. W.B. Randolph, who after testifying as to the receipt and delivery of said prisoners to the proper authorities at Key West, proceeded to say during July last, he left Key West to visit the wreck of the Enterprise, accompanied by Mr. Frederick Filer, and Guillot, one of the prisoners. On arriving there Guillot pointed out the grave of the captain. On disinterring his body, found it so much discomposed, that it could not be taken out. The hole was too short for the body, the knees being doubled up; recognized it, however, as the body of Capt. Morantes, whom I had seen repeatedly in Key West. Head and face showed the marks of blows, one cut about two inches long, near the right ear.

[The] [n]ext witness was John P. Baldwin, Mayor, who testified to having received [the] prisoners, papers of [the] vessel &c., from Lieut. Randolph. Recognized said papers, when produced in Court.

Two others were then called, viz: Jose Garcia, and Manuel Farina, residents of Key West. They testified to having known [the] deceased intimately, and when he was born, his personal appearance, manner of life, &c.

The last witness called by the prosecution was Hubert H. Booley, now lying in jail, charged also with the crime of murder. He testified to certain declarations made to him by the prisoners while in jail, how that Guillot said that he and Ortega, the witness, were both innocent. That he, Guillot, did not dare to assist the captain. Frank [*i.e.*, Carcer] also said that he would never have stuck the captain with the knife, if it had not been for Charlie.

No witnesses being brought forward by the counsel for the defense, Mr. Maloney proceeded to address the jury on the side of the prosecution. He was followed by Messrs. Bethel and Douglas, the District Attorney, Mr. Tatum, concluding. Then[,] after a short charge by the Judge, [during which he] recapitulated the evidence [] and instruct[ed] the jury as to the applicability of the law to the case, the jury went out [] [and] were

absent about three hours[.] [W]hen they returned [they gave] a verdict of “*Guilty*,” against both prisoners.

Afterwards a motion was made for a new trial on various grounds of supposed misrulings by the Court, but was denied. And on Saturday [December] 3d . . . the prisoners were brought in and the Court pronounced the following SENTENCE:

After a full and fair trial before a jury, composed in part of seafaring men like yourselves, and in which you have had the assistance of two zealous and able lawyers, you, Alezandro [sic] Carcer, and you, Guillot Faustin Eloy, have been found guilty of the murder of Beciente A. Morantes, the master of the vessel on board of which you, at the time of the murder, composed a part of the crew. The punishment for this crime is, by the laws of all, or nearly all, civilized nations, death.

The President of the United States has authority, by the Constitution and laws, to pardon you or to commute your sentence, and time will be given to you to make application to him for that purpose. But it is my duty to inform you, lest you should be beguiled by false hopes, that you have no reasonable ground to expect his interposition in your behalf. He will, undoubtedly, in your case, permit the law to take its course.

But, although you have no reason to hope for the President’s pardon, yet, notwithstanding the magnitude and enormity of your crime, you may, nevertheless, hope for pardon from that Almighty and Merciful Being, whose government and laws you have so greatly despised. You are not beyond the reach of His mercy. Your religion teaches you that God’s forgiveness may be extended to you, upon the condition of deep, earnest, and sincere contrition and sorrow for the past, and faith in the atonement His Son has made for us all.

To enable you to seek His pardon, as well as to apply to the President, if you should think proper to do so, time will be allowed you until Monday, the 9th of January next. In the meantime, any priest or minister of the gospel whom you may desire to see, will be permitted to visit you in your prison. You will also be allowed to write to your friends aboard, and the Marshal will see that your letters are duly mailed.

Although you are strangers in this community, you have no enemies here. You are in a Christian country, and the courtesies and charities, which belong to Christian churches, will be extended to you in your great extremity.

The sentence of the law is, that you, Alezandro [sic] Carcer, and you, Guillot Faustin Eloy, be taken to the jail of the county from whence you came, and from thence to the place of execution, on Monday, the 9th day of January next, and between the hours of ten o’clock in the forenoon and twelve o’clock at noon of that day, on the public common surrounding

the jail, you be hanged by the neck until you are dead; and may God have mercy on your souls!⁶⁵

The *Key of the Gulf* ended its story by reporting on Ortega's subsequent separate trial:

Jose Maria Ortega, the witness in the above case, was tried in this Court on Tuesday [November] 29th . . . for grand larceny—having in his possession a portion of the money said to belong to the Enterprise, being his portion of the division after the murder—and was acquitted.⁶⁶

V. AFTERMATH

News of Marvin's sentence spread rapidly, although the details sometimes got muddled. In its reporting, for example, the *Pittsfield Sun* (a Massachusetts weekly) “forgot” about both Joe and Ortega:

Two sailors, a Spaniard [Carcer] and a Frenchman [Eloy], have been convicted at Key West of the murder, in June last, of Capt. B.A. Morantes of New Orleans, master of [the] schooner Enterprise, of which they formed part of the crew. . . . Davis and another [the cook] escaped at Tampa, a third [Heirup the mate] died at Key West, and the other two [Carcer and Eloy] were disposed of as above mentioned.⁶⁷

Similarly, the *Daily National Democrat*, a newspaper in Marysville, California, misstated what had happened to Carcer and Eloy's fellow crew members:

In the United States Circuit Court of Key West, Florida, on the 23d November, Aleijandro [sic] Carcer and Geuillot [sic] Faustin Eloy, two of the crew of the schooner Enterprise, were convicted for the murder of B.A. Morantes, the captain of the schooner. After the captain was

⁶⁵ *U.S. District Court, KEY OF THE GULF (FL)*, Dec. 10, 1859, at 2 (paraphrasing inserted for improved readability; capitalization as in the original) [hereinafter *Summary*]. It is not surprising that Marvin, a devout Episcopalian, peppered his remarks with references to God. In his later years, Marvin again took up his author's pen, this time writing a full-throated defense of the authenticity of the Gospels. See WILLIAM MARVIN, *AUTHORSHIP OF THE FOUR GOSPELS: EXTERNAL EVIDENCES* (1885).

In contrast, it is surprising that Marvin spent so much time discussing the subject of executive clemency. Based on later events, however, it appears Marvin knew that a request for presidential intervention already was in the works. See *infra* text accompanying note 71.

⁶⁶ *Summary, supra* note 65. Although Ortega was indicted by the same grand jury that had indicted Carcer and Elroy, he was tried by a different petit jury. See GENERAL MINUTES, *supra* note 20, at 40-42 (listing, *id.* at 41, Ortega's petit jurors as being Benjamin Archer; Henry F. Baldwin; Benjamin Curry, Jr.; Cornelius Curtis; John Gordon; Charles Howe, Jr.; William A. Lowe; Jeremiah Pent; Lewis E. Pierce; Jacob Solomon; W.H. Ward; and George G. Watson). The minutes do not reflect who served as the petit jury's foreman.

⁶⁷ [No headline in original], *PITTSFIELD SUN (MA)*, Dec. 15, 1859, at 1.

killed, his money was divided among the crew. The other mutineers, six in number, had not been arrested.⁶⁸

In his autobiography, Marvin makes no mention of the case.⁶⁹ A 2009 profile of Marvin, however, begins:

William Marvin was a hanging judge. So learned Alejandro Career [sic] and Guillot Eloy of the American schooner *Enterprise* when they snapped and swung for the murder of Captain B.A. Morantes in 1859. Known as a legal lion and the only moral force in southern Florida, Federal Judge William Marvin played by the book. And when there was no book, he wrote it, authoring *Law of Wreck and Salvage* as he imposed order on those who lived off shipwrecks in the Florida Keys.⁷⁰

In fact, Eloy did *not* hang. Three weeks after Marvin pronounced sentence, President James Buchanan issued the following order:

James Buchanan,
President of the United States of America.

To all to whom these presents shall come, Greeting:

Whereas, it appears that at a term of the District Court of the United States of America, for the Southern District of Florida, begun and holden at Key West, within and for said District, on the [left blank in original] day of November, in the year of our Lord one thousand eight hundred and fifty-nine, Guillot Faustin Eloy, one of the crew of the American Schooner “Enterprise” was convicted of the murder of Beciente A. Morantes, the master of the said Schooner, and on the [left blank in original] day of [left blank in original] in the same year, was sentenced by the said Court to be hanged on the ninth day of January in the year of our Lord one thousand eight hundred and sixty; —

And whereas, the said convict has besought me to commute his said sentence of death to some punishment of less severity, and has alleged in his behalf that he was surrounded on board of said Schooner “Enterprise” by a band of determined and lawless murderers, and in fear of his own life should he resist them, and that any participation he may have appeared to have taken, in the murder of the said Beciente A. Morantes, was from a desire to save himself, and not from a desire to take the life of the said Morantes, and that he voluntarily made known the fact that the said Morantes had been murdered, and voluntarily accompanied the [Deputy]

⁶⁸ *Mutiny and Murder*, DAILY NAT'L DEM. (Marysville, CA), Dec. 31, 1859, at 2.

⁶⁹ See Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 FLA. HIST. Q. 179 (1958).

⁷⁰ Kihm Winship, *Judge, Governor, Gardener*, SKANEATELES, Sept. 24, 2009, <https://kihm6.wordpress.com/2009/09/24/the-hanging-judge/>.

Marshal of the United States to the place where the murder had been committed, and pointed out the spot where the body of said Morantes was buried;

And whereas, it has been stated to me by the Judge before whom the said Guillot Faustin Eloy was tried and convicted, that the said convict did voluntarily make known the fact that the said Morantes had been murdered and did willingly go with the [Deputy] Marshal and point out the spot where the body of the said Morantes was buried;

And whereas, Samuel J. Douglas and Winer Bethel, the Counsel appointed by the Court to defend the said Guillot Faustin Eloy, have stated to me in writing, that the facts set forth in his petition are substantially true, and have earnestly besought me to commute his sentence;

Now therefore, be it known, that I, James Buchanan, President of the United States of America, in consideration of the premises, and for other good and sufficient reasons me thereunto moving, have commuted and by these presents do commute the sentence of death pronounced by the said Court upon the said Guillot Faustin Eloy to imprisonment for seven years, that is to say, I have granted, and do hereby grant unto the said Guillot Faustin Eloy a pardon, so as to remit to him the penalty of death, on condition that he undergo an imprisonment at hard labor in the Penitentiary of the District of Columbia for and during the term of seven years.

In testimony whereof, I have herewith signed my name and caused the Seal of the United States to be affixed.

Done at the City of Washington, this twentieth day of December A.D. 1859, and of the Independence of the United States the Eighty-fourth.

James Buchanan

By the President:

Lewis Cass,
Secretary of State.⁷¹

Once again, the press was quick to report this latest development. In its December 24, 1859, issue, for example, the *Pittsburgh Post* informed its readers:

⁷¹ The original of Buchanan's commutation order is housed in the National Archives in College Park, Maryland, in Record Group 59 ("General Records of the Department of State, 1763-2002," Series: Requisitions for Pardons, 1858-1862, File Unit: Guillot Faustin Eloy (Dec. 19, 1859) [Buchanan]). See <https://catalog.archives.gov/id/225276316>. A copy can be found on-line in the ProQuest Congressional database under "Executive Orders and Presidential Proclamations—Signed by the President; Presidential Pardons" (Accession No: 1859-44-31, Title: Commutation of Death Sentence for Murder: Guillot F. Eloy, Date: Dec. 20, 1859). See <https://congressional.proquest.com/>.

On March 9, 1860, in accordance with Buchanan's order, Marvin resented Eloy to seven years hard labor in the D.C. penitentiary. See GENERAL MINUTES, *supra* note 20, at 43-44.

Guillot Faustin Eloy, one of the several persons convicted in the United States court for the [Southern] district of Florida, for the murder of the master of the American schooner Enterprise, and sentenced to be hanged on the 9th of January, has had his sentence commuted, by the President, to imprisonment in the penitentiary of the District of Columbia for the period of seven years. It appears from papers laid before the President, that Eloy only participated in the murder through fear of his more criminal companions on board the vessel, and that he stated the facts of the murder to the authorities of the law at Key West, and voluntarily accompanied the [deputy] marshal to the scene of the tragedy and pointed out the spot where the captain was buried. The prisoner is a Frenchman, twenty-two years of age.⁷²

In its January 7, 1860, issue, the *Key of the Gulf* expressed its displeasure with Buchanan's decision to spare Eloy's life:

The President of the United States has been pleased to commute the sentence of [] GUILLOT F. ELOY convicted as accessory to the murder to Capt. B.A. MORANTES of the schooner Enterprise from death, to imprisonment for seven years, in the Penitentiary of the District of Columbia.

The same steamer which bro't [sic] this document by a strange coincidence brought as a passenger [Adele Morantes,] the widow of Captain MORANTES[,] on her way to Havana to arrange the affairs of her deceased husband.

We do not share in the sympathy manifested in behalf of this convicted felon, and we are glad to believe that it is confined to a few only; who by the influence of their positions, nevertheless, have counselled the President to an act which nineteen twentieths [95%] of this community condemn.

Our sympathies are with the disgustingly mutilated remains of the deceased and his surviving widow and daughter.

We have been told that the steamer Isabel refused compensation for the passage of this afflicted lady, and that she has received like kindnesses from other managers of other public conveyances on the route hither. Gentlemen, you have your reward in the consciousness of a charity *not misplaced*.⁷³

To the modern reader, Buchanan's decision to pardon Eloy likely seems inexplicable. During his presidency (1857-61), however, Buchanan showed generosity to a wide range of persons (150 in all).⁷⁴ Notable recipients included

⁷² *Sentence Commuted*, PITT. POST (PA), Dec. 24, 1859, at 2.

⁷³ *Reprieved*, KEY OF THE GULF (FL), Jan. 7, 1860, at 2 (emphasis in original).

⁷⁴ See P.S. Ruckman, Jr., *Federal Executive Clemency in [the] United States, 1789-1995*:

Mormon president Brigham Young (for instigating the 1857-58 “Utah War”)⁷⁵ and former Pennsylvania state judge Daniel B. Vandersmith (convicted by a federal court in 1859 of two counts of forgery).⁷⁶

Likely also difficult for a modern reader to understand is Buchanan’s directive that Eloy serve his sentence in the District of Columbia penitentiary. As has been explained elsewhere, however, in the late 1850s the D.C. penitentiary, which was under-utilized, began accepting prisoners from other jurisdictions to help cover its operating costs. This delighted Congress, which, as the facility’s overseer, was on the hook for any financial shortfalls.⁷⁷ Thus, Buchanan’s decision to send Eloy to the D.C. penitentiary was just a bit of frugal bookkeeping.

On March 14, 1860, the *New York Daily Tribune* reported that Eloy was on his way to the nation’s capital to begin serving his sentence:

The steamship Isabel has arrived [here in Charleston, South Carolina] from Havana 10th inst., via Key West.

Among the passengers are the [Maximillian] Marezek opera troupe and Guillott [sic] V. [sic] Eloy, in charge of the Marshal at Key West, en route to the Penitentiary at Washington, having been convicted of being [an] accessory to the murder of Capt. Morantes.⁷⁸

A Preliminary Report, SSRN, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214593 (under “Table 2”). With 150 approvals, Buchanan left office having granted slightly more clemency petitions than his predecessors, who had averaged 137.5 approvals per four-year term. *Id.*

⁷⁵ When informed he had been pardoned, Young expressed bemusement:

I thank President Buchanan for forgiving me, but I really cannot tell what I have done. I know one thing, and that is, that the people called Mormons are a loyal and law-abiding people, and have ever been. Neither President Buchanan nor anyone else can contradict [this] statement. It is true that Lot Smith burned some wagons containing government supplies for the army. This was an overt act, and if it is for this that we are to be pardoned, I accept the pardon.

GEORGE Q. CANNON, *THE LIFE OF BRIGHAM YOUNG* 137 (1893). For a further look at the Utah War, see DAVID L. BIGLER & WILL BAGLEY, *THE MORMON REBELLION: AMERICA’S FIRST CIVIL WAR, 1857-1858* (2011).

⁷⁶ For a news report about Vandersmith’s conviction, see [*No headline in original*], *DAILY PICAYUNE* (New Orleans), May 4, 1859, at 1. For a copy of Vandersmith’s pardon, see “On His Penultimate Day in Office, President James Buchanan Pardons a Judge, March 2, 1861,” SHAPPELL MANUSCRIPT FOUNDATION, at <https://www.shapell.org/manuscript/judge-receives-buchanan-presidential-pardon-forgery/>.

⁷⁷ See David K. Sullivan, *Behind Prison Walls: The Operation of the District Penitentiary, 1831-1862*, 71/72 RECS. COLUM. HIST. SOC’Y, WASHINGTON, D.C. 243, 253-54 (1971/1972).

⁷⁸ *Later [News] from Havana*, N.Y. *DAILY TRIB.*, Mar. 14, 1860, at 5. Marezek (1821-97) was one of the country’s most famous opera impresarios. See KATHERINE K. PRESTON, *OPERA ON THE ROAD: TRAVELING OPERA TROUPES IN THE UNITED STATES, 1825-60*, at 147 (1993) (“During the mid to late 1850s, Marezek managed his own troupe, the Marezek Opera Company, which toured extensively in the United States, Mexico, and Cuba.”). See also *Max Marezek is Dead*, N.Y. *TIMES*, May 15, 1897, at 7.

As matters turned out, this was the last time any newspaper would report on Eloy's whereabouts.⁷⁹

In contrast, Carcer *did* hang. In its January 14, 1860, issue, the *Key of the Gulf* reported:

Alejandro Carcer suffered the extreme penalty of the law on the 9th inst. At 11 a.m., he was taken from the Jail by the U.S. Marshal and his assistants, and from thence under guard of the U.S. troops to the gallows, in the rear of the same. The prisoner was attended by two Catholic clergymen, one of them a Spanish gentleman, invited from Cuba by the Marshal for the purpose.

The appearance of the prisoner was anything but pleasant—his conduct and bearing indicating utter abandonment and debasing recklessness, extremely repulsive.

He ascended the ladder on a run, and until nearly the last moment appeared very much excited and indulged in a few violent invectives; he however thanked the officers for their kindnesses, said he forgave all, and asked to be forgiven. When placed on the trap he became as fixed as a statue; and when the drop fell, died almost instantly. He remained suspended about thirty minutes, and was then taken down and buried.

This is the only execution that has taken place on our Island for over twenty years past, and we were gratified to find the number of spectators much smaller than was expected, but regretted to see that it was in part

⁷⁹ In September 1862, the D.C. penitentiary was converted into a federal military installation and its prisoners were sent to the Albany state penitentiary in New York. See *Albany County Jail and Penitentiary Records, 1825-1976*, ALBANY COUNTY HALL OF RECORDS, at <https://www.albanycounty.com/home/showpublisheddocument?id=308> (“[In] 1862, federal prisoners from the District of Columbia were transferred to Albany when the United States Arsenal took over the penitentiary there and it closed. This included confederate soldiers from the south and many longstanding prisoners convicted of breaking federal laws. . . . [T]he [Albany] penitentiary [was paid] a boarding fee of \$1.50 per prisoner per week [and additionally benefitted from an increase in its] workforce.”).

Despite the foregoing, an examination of the following Albany penitentiary records turns up no trace of Eloy:

- Deputy's Register of Prisoners: 1856-1871
- Register of Prisoners: 1854-1865
- Register of Federal Convicts from Washington, D.C.: 1862-1870, 1886-1927
- Record of Commitment AKA GAOL (JAIL) Book: 1825-1829, 1860-1880
- Record of Commitment: 1861-1863

See “Albany County Hall of Records—Researchers Form,” dated May 14, 2021 (documenting the results of the searches performed at my request by Deputy County Clerk Craig A. Carlson) (copy on file with the author). This suggests that Eloy: (a) never made it to Washington, D.C.; or (b) no longer was in federal custody (due to death, early release, escape, or further transfer) by the time of the 1862 prisoner transfer.

made up of females—sad evidence of immodesty and morbid curiosity—gazing unmoved upon the revolting spectacle.⁸⁰

It is not known what happened to Charlie Davis (the crewman who killed Morantes) or the cook. After their furtive escape from the *Delaware*, no further mention of them turns up. This suggests they either: (a) drowned; or (b) never were caught.⁸¹

VI. CONCLUSION

Despite my best efforts, there is still much we do not know about the *Enterprise* case, including: 1) who planned the voyage and outfitted the ship?; 2) where was the vessel actually headed?; 3) why did Morantes have so much gold in his trunk (and where did it come from)?; 4) did the crew really commit mutiny, and kill their captain, because of bad food?; 5) what became of Ortega after he was exonerated?; 6) did Eloy serve his full sentence, and if so, what happened to him following his release?; and, 7) how did Davis and the cook manage to elude capture? It is, of course, unlikely that we will ever learn the answers to any of these questions.

⁸⁰ *Execution of Carcer*, KEY OF THE GULF (FL), Jan. 14, 1860, at 2 (paragraphing inserted for improved readability). Curiously, Carcer's hanging is not listed in the "ESPY File," the massive database of U.S. executions occurring between 1608 and 2002. See M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The ESPY File*, DEATH PENALTY INFORMATION CENTER, at <https://www.deathpenaltyinfo.org/executions-us-1608-2002-espy-file>. Other sources are to the same effect. See, e.g., *Florida Executions*, USGENWEBSITES.ORG, at <https://usgenwebsites.org/flgenweb/FLUnion/02executions-fl%20-%20franklin%20thru%20washington.pdf> (indicating that there were no executions in either Key West or Monroe County between 1831 and 1883). There is an oblique reference to Carcer's execution in JAMES M. DENHAM, "A ROGUE'S PARADISE": CRIME AND PUNISHMENT IN ANTEBELLUM FLORIDA, 1821-1861, at 209, 333 n.19 (1997) (reporting that two unnamed sailors possibly were executed in 1860 at Key West for the murder of "Capt. Morantes").

⁸¹ If they did not drown, the subsequent outbreak of the Civil War presumably would have made the pair's capture a much less pressing priority, especially as Southern police manpower and resources were shifted away from law enforcement and towards the Confederacy's military needs. See generally Robert L. Hampel & Charles W. Ormsby, Jr., *Crime and Punishment on the Civil War Homefront*, 106 PA. MAG. HIST. & BIO. 223 (1982).

THE CONFEDERATE ADMIRALTY COURT AT KEY WEST

Robert M. Jarvis*

ABSTRACT

In 1861, the Confederate States of America authorized the establishment of a “Court of Admiralty and Maritime Jurisdiction” at Key West. Although a judge was appointed, the court never sat because the island remained in Union hands throughout the Civil War. After first describing the court’s creation and staffing, this article highlights the various procedural and practical problems the court would have faced if it had been able to operate.

KEYWORDS

Appeals, Confederate States of America, Federal Courts, Forts, Jurisdiction, Key West, McQueen McIntosh, Prize Law, U.S. Civil War, William Marvin

CONTENTS

I. INTRODUCTION	228
II. THE CAMJ.....	231
A. Creation.....	231
B. Staffing	237
C. Attempt to Open	244
D. Near Dissolution	249
III. ADDITIONAL PROBLEMS.....	250
A. Jurisdiction.....	250
B. Governing Law	252
C. Publication of Decisions	253
D. Appeals.....	253
IV. CONCLUSION	253

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I. INTRODUCTION

On February 8, 1861, the delegates constituting the Provisional Congress of the Confederate States of America (“CSA”) promulgated a “Provisional Constitution.”¹ This temporary document remained in effect until February 22, 1862, when the CSA’s Permanent Congress replaced it with a “Permanent Constitution.”²

Article III, section 1(1) of the CSA’s Provisional Constitution provided: “The judicial power of the Confederacy shall be vested in one Supreme Court, and in such inferior courts as are herein directed, or as the Congress may from time to time ordain and establish.”³ Article III, section 1(2) of the CSA’s Provisional Constitution further specified:

Each State shall constitute a District, in which there shall be a court called a District Court, which, until otherwise provided by the Congress, shall have the jurisdiction vested by the laws of the United States, as far as applicable, in both the District and Circuit Courts of the United States, for that State; the Judge whereof shall be appointed by the President, by and with the advice and consent of the Congress, and shall, until otherwise provided by the Congress, exercise the power and authority vested by the laws of the United States in the Judges of the District and Circuit Courts of the United States, for that State, and shall appoint the times and places at which the courts shall be held. Appeals may be taken directly from the District Courts to the Supreme Court, under similar regulations to those which are provided in cases of appeal to the Supreme Court of the United States, or under such regulations as may be provided by the Congress. The commissions of all the judges shall expire with this Provisional Government.⁴

¹ See *The Constitution of the Southern Confederacy*, N.Y. HERALD, Feb. 10, 1861, at 1. For the text of the CSA’s Provisional Constitution, see [CONFEDERATE STATES OF AMERICA] DEPARTMENT OF JUSTICE, *THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 1-8* (James M. Mathews ed., 1864) [hereinafter *PROVISIONAL CONGRESS STATUTES*]. The CSA’s Provisional Constitution also is available, in an easier-to-read format, at https://avalon.law.yale.edu/19th_century/csa_csapro.asp.

² See [*No Headline in Original*], MORN. POST (London), Feb. 22, 1862, at 4 (explaining that February 22 was chosen to officially begin the CSA because it was George Washington’s birthday, “the most revered of American anniversaries, and the only one which continues to be honoured by both fragments of the dissevered Union.”).

For the text of the CSA’s Permanent Constitution, see *PROVISIONAL CONGRESS STATUTES*, *supra* note 1, at 11-23. The CSA’s Permanent Constitution also is available, again in an easier-to-read format, at https://avalon.law.yale.edu/19th_century/csa_csa.asp. With certain exceptions (such as their treatment of slavery and states’ rights), the CSA’s two constitutions were nearly identical to the U.S. constitution. See LOCHLAINN SEABROOK, *THE CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA EXPLAINED: A CLAUSE-BY-CLAUSE STUDY OF THE SOUTH’S MAGNA CARTA* (2016). See also MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* (1991).

³ *PROVISIONAL CONGRESS STATUTES*, *supra* note 1, at 6.

⁴ *Id.*

During its time as a U.S. state, Florida had been divided into two federal districts courts, designated, respectively, as the Northern District (“USDC-NDF”) and the Southern District (“USDC-SDF”).⁵ While the USDC-NDF, headquartered in Tallahassee, handled the bulk of Florida’s federal court cases, the USDC-SDF, sitting in Key West, heard the numerous disputes generated by the region’s wrecking (*i.e.*, marine salvage) industry.⁶

Recognizing that Florida needed a second Confederate district court, but hamstrung by Article III, section 1(2) of the CSA’s Provisional Constitution, the CSA’s Provisional Congress decided to utilize Article III, section 1(1) of the CSA’s Provisional Constitution, which allowed it to create an infinite number of “inferior” courts. Thus, on March 11, 1861, the CSA’s Provisional Congress voted to establish a Court of Admiralty and Maritime Jurisdiction (“CAMJ”) at Key West.⁷

Five days later, the CSA’s Provisional Congress enacted a Confederate Judiciary Act (“CJA”) to implement Article III of the CSA’s Provisional Constitution.⁸ Section 2 of the Act repeated:

[E]ach of the Confederate States shall constitute one district, in which there shall be a court called a District Court, to consist of one judge, who shall reside in the state for which he is appointed, and shall receive a salary equal to that paid to a judge of the court of the highest jurisdiction in the state where he resides, payable quarterly.⁹

The subsequent admission of two large states to the CSA—Texas on March 2, 1861¹⁰ and Virginia on May 7, 1861¹¹—made it obvious that treating each state as a single judicial district was impractical. As a result, on May 21, 1861, the following amendment to Article III, section 1(2) of the CSA’s Provisional Constitution was adopted:

Be it ordained by the Congress of the Confederate States of America,
That the second paragraph of the first section of the third Article of the Constitution of the Confederate States of America, be so amended in the first line of said paragraph, as to read, “Each State shall, until otherwise

⁵ See KERMIT L. HALL & ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990, at 21-24 (1991).

⁶ *Id.* For descriptions of Key West’s wrecking industry, see, e.g., JOHN VIELE, THE WRECKERS (2011); W. Randy Miller, *The Case of the Brig Halcyon: A Study in Old Key West Admiralty Law*, 27 J. MAR. L. & COM. 311 (1996); Dorothy Dodd, *The Wrecking Business on the Florida Reef 1822-1860*, 22 FLA. HIST. Q. 171 (1944); *Key West and Salvage in 1850*, 8 FLA. HIST. Q. 47 (1929); Jerry Wilkinson, *History of Wrecking*, at <http://www.keyshistory.org/wrecking.html>.

⁷ See PROVISIONAL CONGRESS STATUTES, *supra* note 1, at 60-61 (“An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida”).

⁸ See *id.* at 75-87 (“An Act to Establish the Judicial Courts of the Confederate States of America”).

⁹ *Id.* at 75.

¹⁰ See *id.* at 44 (“An Act to Admit Texas as a Member of the Confederate States of America”).

¹¹ See *id.* at 104 (“An Act to Admit the Commonwealth of Virginia as a Member of the Confederate States of America”).

enacted by law, constitute a district;” and in the sixth line, after the word “judge,” add “or judges.”¹²

On the same day that this amendment passed, legislation was enacted splitting in two the Confederate judicial districts of Texas¹³ and Virginia.¹⁴

Discussions of the CSA’s judicial system typically focus on the CSA’s Supreme Court (which never was formed);¹⁵ the CSA’s district courts (which met irregularly);¹⁶ or the outsized role played by the state courts (which ended up with most of the CSA’s judicial business).¹⁷ In contrast, the CAMJ has been all

¹² *Id.* at 9 (“An Ordinance of the Convention of the Congress of the Confederate States”).

¹³ *See id.* at 127 (“An Act to Divide the State of Texas into Two Judicial Districts, and to Provide for the Appointment of Judges and Officers in the Same”).

¹⁴ *See id.* at 149 (“An Act to Establish the Judicial Courts of the Confederate States of America, in the State of Virginia”).

¹⁵ *See, e.g.,* Charles E. George, *The Supreme Court of the Confederate States of America*, 6 VA. L. REG. (n.s.) 592 (1920); Bradley T. Johnson, *Why the Confederate States Did Not Have a Supreme Court*, 27 S. HIST. SOC. PAPERS 307 (1899); Robert W. Ferrell, “The Supreme Court of the Confederate States of America” (unpublished honors thesis, University of Richmond, 1934), available at <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1310&context=honors-theses>. *See also* David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865*, 90 VA. L. REV. 1257, 1366-76 (2004) (“XI. The Missing Supreme Court”).

In the absence of a Supreme Court, numerous questions that would have been put to it instead were directed to the CSA’s attorneys general, who did their best to formulate answers. *See* THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861-1865 (Rembert W. Patrick ed., 1950). As has been explained elsewhere:

Though the Confederate constitution made provisions for the existence of a supreme judicial court, with powers like those of the Supreme Court of the United States, the provisional congress refused to enact the legislation necessary to actually establish the national court. Therefore, the attorneys general of the Confederacy were often called on to act in place of a national tribunal and to render opinions interpreting the laws enacted by the Confederate congress. Accordingly their opinions were varied, covering both commonplace issues and constitutional questions.

From 1861 to 1865, the Confederacy was served by four full time attorneys general—Judah Philip Benjamin, Thomas Bragg, Thomas Hill Watts, and George Davis—and by Wade Keyes, who functioned at various times as assistant, acting, and *ad interim* (temporary) attorney general. As a group, they authored 218 opinions for Confederate president Jefferson Davis and members of his cabinet; most of the opinions were requested by the Departments of War, Treasury, and the Navy, and most were related to the fighting of, or financing of, the U.S. Civil War.

Confederate Attorneys General, at <https://law.jrank.org/pages/5538/Confederate-Attorneys-General.html>.

¹⁶ *See, e.g.,* Ritchie Williams, *Flotsam and Jetsam: Admiralty Cases in Confederate Georgia*, 28 J. MAR. L. & COM. 617 (1997); T. R. Havins, *Administration of the Sequestration Act in the Confederate District Court for the Western District of Texas, 1862-1865*, 43 SW. HIST. Q. 295 (1940); Warren Grice, *The Confederate States Court for Georgia*, 9 GA. HIST. Q. 131 (1925).

¹⁷ *See, e.g.,* WARREN MOISE, REBELLION IN THE TEMPLE OF JUSTICE: THE FEDERAL AND

but overlooked.¹⁸ In his otherwise excellent 88-page article describing the CSA's judicial system, for example, Professor G. Edward White dismisses it in a single sentence: "The [CSA's] additional constitutional court was the Court of Admiralty and Maritime Jurisdiction, located at Key West in Florida."¹⁹

The seminal work on the CSA's judicial system is William M. Robinson, Jr.'s 1941 treatise *Justice in Grey: A History of the Judicial System of the Confederate States of America*.²⁰ Although Robinson devotes several pages to the CAMJ,²¹ the instant article provides the first full portrait of the court.

II. THE CAMJ

A. CREATION

As explained above, soon after its formation the CSA's Provisional Congress voted to establish an admiralty court at Key West.²² As Robinson points out, the

STATE COURTS IN SOUTH CAROLINA DURING THE WAR BETWEEN THE STATES (2005); Winthrop Rutherford, *Drawing Lines of Sovereignty: State Habeas Doctrine and the Substance of States' Rights in Confederate Conscriptio*n Cases, 51 U. RICH. L. REV. 93 (2017); Robert W. Lee, *Florida Legal History: The Courts and Law During the Civil War, Reconstruction and Restoration Eras*, 15 ST. THOMAS L. REV. 485 (2003); Jennifer Van Zant, *Confederate Conscriptio*n and the North Carolina Supreme Court, 72 N.C. HIST. REV. 54 (1995); J.G. de Rouilhac Hamilton, *The State Courts and the Confederate Constitution*, 4 J. S. HIST. 425 (1938); Sidney D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, 8 LAW. & BANKER & S. BENCH & B. REV. 387 (1915); Sam D. Elliott, *Tennessee's Confederate Courts*, 48 TENN. B.J. 28 (Jan. 2012).

¹⁸ The ignoring of the CAMJ began at an early date:

The Hon. Charles Sumner [R-MA], in his [April 13, 1869] speech in the [U.S.] Senate [denouncing the proposed Johnson-Clarendon Treaty, which sought to settle various war-related claims between the United States and the United Kingdom] averred . . . that . . . the Confederate States . . . were "without prize courts, or other tribunals for the administration of justice on the ocean." By the Act of March 11th, 1861, [however,] the Confederate Congress established "a Court of Admiralty and [M]aritime [J]urisdiction at Key West, in the State of Florida," and adopted for its guidance the "laws of the United States," until otherwise provided.

J. THOMAS SCHARF, HISTORY OF THE CONFEDERATE STATES NAVY FROM ITS ORGANIZATION TO THE SURRENDER OF ITS LAST VESSEL 432 (1887) (footnotes omitted).

¹⁹ G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 510 n.277 (2011).

²⁰ See WILLIAM M. ROBINSON, JR., JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA (1941). As readers quickly discover, Robinson does not hide his enthusiasm for the CSA. See, e.g., Charles Fairman, *Book Review*, 55 HARV. L. REV. 172, 173 (1941) ("Of the author's own point of view it may be said, in paraphrase, that he is attached to the principles of the Constitution of the Confederate States, and well disposed to their good order and happiness.").

²¹ See ROBINSON, *supra* note 20, at 299-308 ("XIII. Special Courts of Admiralty and the Imbroglia at Key West").

²² See *supra* note 7 and accompanying text.

CAMJ was a “plain evasion,” but “a happy solution,” to the CSA’s Provisional Constitution’s limit of one district court per state.²³

In contrast to earlier U.S. initiatives,²⁴ wrecking was *not* the reason the CSA was eager to have a court at Key West. With war just a month away,²⁵ the CSA was making plans to have “privateers” seize Union ships and sail them to Southern ports, where judges would be needed to “condemn” them as “prize.”²⁶ Because of its location, Key West was expected to be the CSA’s chief prize station:

A letter of marque and reprisal is a government license authorizing a person, known as a privateer, to attack and capture enemy vessels and take them before prize courts to be condemned and sold[, with the privateer receiving a healthy cut and the government keeping the rest of the proceeds]. Cruising for prizes with a letter of marque was considered an honorable profession, in contrast to [the] universally reviled capital crime of unlicensed piracy. . . .

The Confederate Act of March 11, 1861, established “a Court of Admiralty and maritime jurisdiction at Key West, in the State of Florida[to hear prize cases.]” [Confederate district courts] in New Orleans, Louisiana; Mobile, Alabama; Savannah, Georgia; and additional Southern port cities [also stood ready to hear prize cases].

The [Confederate] Act of May 6, 1861, [which] authorized [the] issuance of letters of marque, [was the final necessary step. With its passage,] a fleet of Confederate privateers [was unleashed] to prey upon the commerce of the United States across the globe. . . .

[During the early months of the war,] only two Confederate privateers [were] captured or destroyed and only two of their prizes [were] retaken

²³ See ROBINSON, *supra* note 20, at 299, 300.

²⁴ In 1828, during Florida’s territorial period, the U.S. Congress created a superior court, known as the “Southern Judicial District,” in Key West to hear the area’s many wrecking cases. See HALL & RISE, *supra* note 5, at 10-12. In 1847, Congress divided the recently formed U.S. District Court for the District of Florida into the USDC-NDF and USDC-SDF for the same reason. *Id.* at 21-24.

²⁵ The Civil War began on April 12, 1861, when Confederate troops attacked Fort Sumter in Charleston, South Carolina. See, e.g., WESLEY MOODY, *THE BATTLE OF FORT SUMTER: THE FIRST SHOTS OF THE AMERICAN CIVIL WAR* (2016).

²⁶ The term “prize” refers to “a ship or property captured at sea under the laws of war.” James Kraska, “Prize Law,” at 1 (July 1, 2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876724. By 1861, it was understood “universally” that to become prize, an item had to be “condemned” as such “by a court of competent jurisdiction . . . in the country of the enemy. . . .” FRANCIS H. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS* 162-63 (1st ed. 1861).

Although U.S. district courts continue to have prize jurisdiction, see 28 U.S.C. § 1333(2), changes in naval warfare have made prize law obsolete. Indeed, a prize case has not been heard in this country since *United States v. The Europa*, 80 F. Supp. 12 (S.D.N.Y. 1948). Some commentators, however, have balked at the notion that prize law has lost its relevancy. See, e.g., David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT’L L. REV. 31 (1995).

by [Union] vessels. . . . Southern privateers, on the other hand, had within the same time captured approximately sixty federal vessels. Nonetheless, the initial enthusiasm for privateering was not sustained because [Southern] crews found it difficult to impossible to deliver their prizes to Confederate courts because of the Union blockade. As a result, the anticipated profits were never realized [and] most [privateers] turned to blockade running as a more profitable venture.²⁷

The CAMJ bill was introduced on March 8, 1861, by Mississippi Deputy Alexander M. Clayton.²⁸ Its driving force, however, was Florida Deputy J. Patton Anderson:

²⁷ Patricia A. Kaufmann, *Confederate Prize Court Mail*, 134 AM. PHILATELIST 38, 38-39 (2020). See also ROBINSON, *supra* note 20, at 211-12. For the CSA's prize statute, see PROVISIONAL CONGRESS STATUTES, *supra* note 1, at 100-04 ("An Act Recognizing the Existence of War Between the United States and the Confederate States; and Concerning Letters of Marque, Prizes and Prize Goods").

A great deal has been written about the Union's blockade of the South's ports, which the Union was able to enforce because its navy was three times the size of the CSA's navy. See, e.g., JAMES M. MCPHERSON, *WAR ON THE WATERS: THE UNION AND CONFEDERATE NAVIES, 1861-1865* (2012); NICK WYNNE & JOE CRANKSHAW, *FLORIDA CIVIL WAR BLOCKADES: BATTLING FOR THE COAST* (2011); CRAIG L. SYMONDS, *THE CIVIL WAR AT SEA* (2009). See also John Paul Jones, *Into the Wind: Rhett Butler and the Law of War at Sea*, 31 J. MAR. L. & COM. 633 (2000). Two recent commentators, however, insist the Union's blockade was not as successful as historians have claimed. See MICHAEL BONNER & PETER MCCORD, *THE UNION BLOCKADE IN THE AMERICAN CIVIL WAR: A REASSESSMENT* (2021).

²⁸ See 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861-1865, at 115 (1904) [hereinafter CSA JOURNAL]. See also *The Southern Confederacy Congress*, SUN (Balt.), Mar. 9, 1861, at 1.

For a profile of Clayton, see Leslie H. Southwick, *Alexander Clayton: (1801-1889) Judge*, MISSISSIPPI ENCYCLOPEDIA, last updated Apr. 13, 2018, at <https://mississippiencyclopedia.org/entries/alexander-clayton/>. As Southwick explains:

[Clayton was born] in Campbell County, Virginia, . . . studied under a lawyer in Lynchburg in 1822[,] and was admitted to the bar the following year. He practiced first in Louisa County, Virginia. . . .

He had little professional success, so the family moved to Clarksville, Tennessee, in 1829. . . . On 11 December 1832 Pres. Andrew Jackson nominated Clayton to be one of the three federal judges in the Arkansas Territory. He served until 1834, when he contracted cholera. . . .

In 1837 Clayton moved to Mississippi, his home for the remainder of his life. . . .

Clayton was elected to [Mississippi's] High Court of Errors and Appeals in 1842. His opinions were thorough and largely free from political passions. . . . In his 1851 reelection campaign, he was allied with Jefferson Davis's candidacy for governor. Both men were defeated. . . .

On 9 May 1861 President Davis nominated Clayton to the Confederate District Court for Mississippi, and he was confirmed and served for the remainder of the Confederacy's existence. It was often impossible[, however, for Clayton] to hold court because of Union occupation.

Id.

[A] native of Tennessee, [Anderson] studied law in Frankfort, Kentucky. After being admitted to the bar, he practiced in Hernando, Mississippi, until 1846[. Following service as a lieutenant colonel in the Mexican War, he spent] a term in the Mississippi legislature[.] [I]n 1853 [he was] appointed by President Pierce [to be the] United States marshal for [the] Washington Territory, which he was later elected to represent as its delegate to Congress. Declining an appointment as territorial governor in 1857, Anderson moved to Florida the same year and established a plantation, [called Casablanca], near Monticello.

As a member of the Florida [secession] convention [in Tallahassee in] January, 1861, Anderson voted for immediate secession and was then appointed [a] delegate to [the CSA conference taking place in] Montgomery. He attended sessions of the Provisional Congress for only about three weeks and took an active part only in seeing that the law establishing a court of admiralty and maritime jurisdiction at Key West was properly written. He resigned on April 8, 1861, to accept the colonelcy of the First Florida Infantry.²⁹

During debate on the bill (March 9, 1861), a disagreement arose over the salary to be paid to the CAMJ's judge, with Anderson proposing \$3,500 and Clayton suggesting \$3,000.³⁰ By a vote of 4-2-1, Anderson prevailed.³¹ Three other minor amendments were agreed to unanimously.³²

As finally adopted, the CAMJ statute read as follows:

The Congress of the Confederate States of America do enact, That a court of admiralty and maritime jurisdiction at Key West, in the State of Florida, shall be and is hereby created, which shall have cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures

²⁹ EZRA J. WARNER & W. BUCK YEARNs, BIOGRAPHICAL REGISTER OF THE CONFEDERATE CONGRESS 5 (1975). For a further profile of Anderson, see JAMES W. RAAB, J. PATTON ANDERSON, CONFEDERATE GENERAL: A BIOGRAPHY (2004).

³⁰ See CSA JOURNAL, *supra* note 28, at 119. Depending on where they lived, U.S. district judges at this time were making between \$1,200 and \$6,000, with those in Florida earning \$2,000. See *Judicial Salaries: U.S. District Court Judges by State, 1789-1891*, FEDERAL JUDICIAL CENTER, at <https://www.fjc.gov/history/judges/judicial-salaries-u.s.-district-court-judges-state-1789-1891#>.

³¹ See CSA JOURNAL, *supra* note 28, at 119. Florida, Georgia, Louisiana, and South Carolina voted for the higher amount; Alabama and Mississippi voted for the lower amount; and Texas abstained because its delegation was divided. *Id.*

³² See *id.* at 119-20. These amendments, respectively, defined the CAMJ's territorial jurisdiction with greater precision; set the salary of the District Attorney at \$200; and required all orders to be signed and sealed by the CAMJ's judge and clerk. The first of these amendments was proposed by South Carolina Deputy Thomas J. Withers. The other two were proposed by Clayton.

Withers now is best known for the sexually explicit love letter that he wrote in 1826 to James H. Hammond, a college friend who later served as South Carolina's governor. See Martin Bauml Duberman, "Writhing Bedfellows": 1826—Two Young Men from Antebellum South Carolina's Ruling Elite Share "Extravagant Delight," 6 J. HOMOSEXUALITY 85 (1981).

under the revenue laws or laws of navigation and trade of the Confederate States, when the seizures are made or cause of complaint arises on waters which are navigable from the sea by vessels of ten or more tons burden, as well as upon the high seas, saving to suiters in all cases the right of a common law remedy, where the remedy at common law is ample and complete. The said court shall exercise jurisdiction in all that part of the State of Florida which lies south of a line drawn due east and west from the northern point of Charlotte Harbor, including the islands, keys, reefs, shoals, harbors, bays and inlets south of said line [*i.e.*, the area to the south of Lake Okeechobee].

SEC. 2. The said court shall also have cognizance of all crimes and offences cognizable under the authority of the Confederate States arising upon the high seas and within the territorial limits aforesaid. And until otherwise provided by law of Congress, the laws of the United States in regard to crimes and offences, and to the mode of procedure, practice and trial in all criminal or penal cases, shall be in force and form the rule of practice and decision in the said court.

SEC. 3. There shall be appointed by the President, by and with the advice and consent of Congress, a judge of said court, for the term prescribed by the Constitution, who shall receive compensation at the rate of three thousand five hundred dollars per annum, payable quarterly. The judge shall reside at Key West in the State aforesaid, and shall hold two regular terms of said court in each year, at Key West, the one commencing on the first Monday of May, the other on the first Monday of November in each year; and shall hold extra sessions of the same from time to time, at such places in said district as occasion may require, to dispatch the business of said court. And the said court shall be at all times open for the purpose of hearing and determining all cases of admiralty and maritime jurisdiction.

SEC. 4. The said judge shall also appoint a marshal and a clerk for said court, who shall be in all respects subject to the provisions of the act entitled "An act to establish the judicial courts of the Confederate States of America," so far as the same relates to the bonds, oaths, qualifications, powers, duties, liabilities and official conduct of the clerks or marshals respectively, and to the remedy for any violation of duty, breach of bond or other official delinquency. And they shall also have the same fees for their respective services as in said act are prescribed.

SEC. 5. The clerk shall reside and keep the records of the court at the place of holding the same, and it shall also be his duty to attend the sittings of the said court wherever held, and keep a record of its acts and proceedings, as if held at the regular place of holding the same. The said marshal shall also attend the said court wherever holden, and shall have power to appoint as many deputies as he may deem necessary, for whose official acts he shall be bound as for his own.

SEC. 6. Appeals may be allowed and writs of error sued out from said court to the supreme court of the Confederate States, in the same manner and upon the same terms as from a district court of the Confederate States.

SEC. 7. The said judge shall also appoint for said court a fit person, learned in the law, to act as attorney for the Confederate States in all matters touching their interest, and in all crimes and offences against their laws. He shall receive for his services a salary of two hundred dollars per annum, payable quarterly, and the further sum of five dollars a day for each day that he may attend said court when in actual session.

SEC. 8. *And be it further enacted*, That no vessel, or any master thereof, shall be regularly employed in the business of wrecking on the coast of Florida without the license of the judge of said court; and before licensing any vessel or master, the judge shall be satisfied that the vessel is seaworthy and properly and sufficiently equipped and fitted for the business of saving property shipwrecked and in distress, and that the master thereof is trustworthy and innocent of any fraud or misconduct in relation to any property shipwrecked or saved on said coast.

SEC. 9. That the said court shall conform to the practice of the district courts when exercising admiralty and maritime jurisdiction, and shall moreover have power to make rules to govern the practice therein, not inconsistent with the laws of the Confederate States.

SEC. 10. All writs and process, either mesne or final, which shall issue from said court, shall bear teste of the judge of said court, and shall be under the seal and signed by the clerk thereof.

SEC. 11. This act shall take effect and be in force from and after the passage thereof.³³

The subsequent enactment of the CJA³⁴ caused sections 4 and 7 of the CAMJ's enabling statute to be slightly modified:

The Congress of the Confederate States of America do enact, That so much of an act entitled "An act to establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida," as provides for the appointment of a district attorney and marshal of said court by the judge thereof, be and the same is hereby repealed, and it is hereby made the duty of the President of the Confederate States to appoint for said court a fit person, learned in the law, to act as attorney for the Confederate States in all crimes and offences against their laws, and in all other matters

³³ See *supra* note 7 and accompanying text. Section 1, defining the CAMJ's territorial jurisdiction as extending from Key West to Charlotte Harbor, and § 8, requiring the CAMJ judge to handle the licensing of wreckers, were holdovers from earlier U.S. acts. See HALL & RISE, *supra* note 5, at 10-11, 22-24.

³⁴ See *supra* note 8 and accompanying text.

touching their interest. The President shall also appoint a marshal for said court; and said attorney and marshal shall receive such pay in every respect, and perform such services respectively as are provided for and required of attorneys and marshals by an act entitled “An act to establish the Judicial Courts of the Confederate States of America.”³⁵

In the heady days following the CAMJ’s creation, Mississippi and Texas also pressed the CSA’s Provisional Congress for admiralty courts (at, respectively, Vicksburg and Galveston). As Robinson explains, their efforts proved unsuccessful.³⁶

B. STAFFING

On March 16, 1861, Jefferson F. Davis, the CSA’s Provisional President, nominated, and the CSA’s Provisional Congress approved, McQueen McIntosh to be the CAMJ’s judge.³⁷ Subsequently, a pair of recess appointments made Fernando J. Moreno the CAMJ’s marshal and John L. Tatum the CSA’s district attorney.³⁸ If

³⁵ PROVISIONAL CONGRESS STATUTES, *supra* note 1, at 66 (“An Act to Amend an Act Entitled ‘An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida’”).

³⁶ See ROBINSON, *supra* note 20, at 302-04.

³⁷ See CSA JOURNAL, *supra* note 28, at 153. In their rush to publish, many newspapers initially got McIntosh’s name wrong and therefore reported that *two* judges had been appointed to the CAMJ. See, e.g., *Sunday Night Despatches*, LOUISVILLE DAILY J. (KY), Mar. 18, 1861, at 3 (“Messrs. McQueen and McIntosh have also been confirmed Judges of the Admiralty Court at Key West[.]”). News of McIntosh’s appointment was greeted with derision by Northern commentators:

McQueen McIntosh has been appointed Judge in Admiralty at Key West, by the bogus Government at Montgomery, but will not enter upon his duties until the United States are dispossessed of Key West, which will happen about the time that the English are persuaded to give up Gibraltar. President Lincoln has just appointed a collector for that port, and as it is under the guns of Fort [Zachary] Taylor, he will not be disturbed, at present, in executing the functions of that appointment.

Key West, NAT’L REPUB. (DC), Mar. 27, 1861, at 2.

³⁸ See *Letter from Montgomery*, DAILY PICAYUNE (New Orleans), Apr. 11, 1861, at 1. See also CSA JOURNAL, *supra* note 28, at 185-86 (reporting that Moreno and Tatum’s appointments were being forwarded to the Committee on the Judiciary for its consideration).

Moreno and Tatum were both Key West residents and, until recently, had held these same positions at the USDC-SDF. See JEFFERSON B. BROWNE, *KEY WEST: THE OLD AND THE NEW* 211 (1912) (listing Moreno’s dates of service as 1853-61 and Tatum’s as 1858-61). See also HALL & RISE, *supra* note 5, at 31-32.

As Browne reports, see *supra* at 56, 175, Moreno (1823-1905), a native of Pensacola, was primarily a merchant, although throughout his life he held a variety of political positions and served one term (1852-53) as Key West’s mayor. Upon his death, one newspaper eulogized him by writing:

The early history of Key West is replete with reminiscences of Col. Moreno. He came here a mere youth and for over half a century was identified with every movement for the upbuilding of Key West. Mr. Moreno was at one

McIntosh appointed someone to be the CAMJ's clerk, as he was authorized to do under section 4 of the CAMJ statute,³⁹ there now is no record of it.⁴⁰

In 1856, McIntosh had been named the second judge of the USDC-NDF.⁴¹

time mayor of Key West; and for many years vice-consul for Great Britain, France, Germany and Spain, and as such represented all other powers. Under Buchanan's administration he served as United States marshal of this district. He was a polished gentleman and one whom it was a pleasure to meet, whether in a business or a social way.

In respect to his memory the flags on the city building and in many prominent places were placed at half mast Monday. The deceased was 83 years old. . . .

Island City News and Notes, DAILY MIAMI METROPOLIS (FL), Nov. 23, 1905, at 9. See also *Fernando Joaquin Moreno*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/45136643/fernando-joaquin-moreno>.

Tatum (1837-75), on the other hand, is something of a mystery. He appears to have been a native of Monticello (in Jefferson County, not far from Tallahassee), and was the brother-in-law, and one-time law partner, of James T. Magbee, a powerful Tampa politician. See Kyle S. VanLandingham, *James T. Magbee: "Union Man, Undoubted Secessionist and High Priest in the Radical Synagogue,"* 20 SUNLAND TRIB. (Journal of the Tampa Historical Society) 7 (1994). Tatum likely secured his federal position with Magbee's help. As Browne reports, once in Key West Tatum became an active figure in the secessionist movement. See BROWNE, *supra*, at 91, 130. By the time the war ended, however, Tatum had moved to Tallahassee. See, e.g., "Pardon Proclamation, issued by President Andrew Johnson, to John L. Tatum of Leon County, Florida, dated Oct. 24, 1865," available at <https://www.ancestry.com/>. The 1870 federal census, taken a few years before his death, lists Tatum as back in Monticello and working as a merchant. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE NINTH CENSUS OF THE UNITED STATES: 1870 (1872) (Page 16, Line 26 of Schedule 1.—Inhabitants in [the] Town of Monticello, in the County of Jefferson, State of Florida, enumerated Aug. 16, 1870). See also *John Lawrence Tatum*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/68332290/john-lawrence-tatum>.

³⁹ See *supra* text accompanying note 33.

⁴⁰ The most obvious choice, however, would have been Joseph B. Browne (1814-88), who had just resigned as the clerk of the USDC-SDF. As his son Jefferson reports, see BROWNE, *supra* note 38, at 225-26, Joseph Browne was born in Windsor, Virginia; moved to Key West when he was 16; and ended up holding numerous local offices, including mayor (multiple times) and postmaster.

Like Moreno and Tatum, Browne was an ardent secessionist. After Jefferson Davis was granted bail in May 1867 (while waiting to be tried for treason), he visited Key West and stayed with Browne. See *Joseph Beverly Browne*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/32092494/joseph-beverly-browne>. See also Nancy Klingener, *Power Magnet: Key West's Long History of Presidential Visits*, WLRN, Apr. 18, 2018, at <https://www.wlrn.org/news/2018-04-18/power-magnet-key-west-s-long-history-of-presidential-visits> (discussing Davis's visit).

⁴¹ Up until his appointment, many observers felt the Democrats would nominate McIntosh for a seat in the U.S. House of Representatives. See *Jacksonville (Fla.) Correspondence*, CHARLESTON DAILY COURIER (SC), Apr. 1, 1856, at 2. Curiously, there is no published biography of McIntosh (1822-68) and his Federal Judicial Center web page (<https://www.fjc.gov/history/judges/mcintosh-mcqueen>) [hereinafter McIntosh FJC Biography] is extremely sparse:

Born 1822 near Darien, GA[.]
Died June 18, 1868, in Pensacola, FL[.]



Judge McQueen McIntosh (1861)
Photograph courtesy of the State Archives of Florida /
Florida Memory RC00517 / reproduction by Michael Hopkins
of Michael Hopkins Photography

Although he had been practicing law in Florida for just six years, McIntosh had managed to make the right political connections to get this position:

Federal Judicial Service:
Judge, U.S. District Court for the Northern District of Florida[.]
Nominated by Franklin Pierce on February 27, 1856, to a seat vacated by
Isaac H. Bronson. Confirmed by the Senate on March 11, 1856[.]
[R]eceived commission on March 11, 1856.
Service terminated on January 3, 1861, due to resignation.
Education: Read law[.]
Professional Career:
Planter, Florida[.]
Private practice, Jacksonville, Florida, 1850-1856[.]
Judge, Confederate District Court, District of Florida [sic], 1861-[1865.]

At the time of his appointment, newspapers described McIntosh as a former resident of Savannah, Georgia, but otherwise said nothing about his background. *See, e.g., [No Headline in Original], SUN (Balt.), Mar. 28, 1856, at 4.* McIntosh's obituary similarly was cryptic, merely reporting that he died in Pensacola "after an illness of several months, in the forty-sixth year of his age." *Florida—Miscellaneous, DAILY PICAYUNE (New Orleans), June 26, 1868, at 4.* A later source indicates McIntosh married a woman named Georgia Fannin (b. 1825) in Savannah on December 21, 1848 and with her had four children: Georgia, Thomas, Henry, and Jessie. *See JOSEPH GASTON BAILLIE BULLOCH, A HISTORY AND GENEALOGY OF THE FAMILY OF BAILLIE OF DUNAIN 100 (1898).*

In 1855, Judge [Isaac H.] Bronson [the Northern District's first judge] died at his home in Palatka. The vacancy created by his death intensified sectional and political rivalries within the state. Residents of western Florida had resented Bronson's partiality to holding court in St. Augustine, only thirty miles from Palatka, and his comparatively infrequent trips to Tallahassee and the Panhandle. At the same time, interested parties on the east coast wanted to maintain their close connection with the federal court. Debate over the appointment also was split between those who advocated a zealous states' rights supporter on the court and those who favored a more moderate nominee to the federal bench.

Stephen R. Mallor, [the] moderate [U.S.] senator from Key West who shared the concerns of commercial interests in the state's northern Gulf Coast ports, endorsed George S. Hawkins, a former U.S. attorney, Florida Supreme Court justice, state legislator, and circuit court judge from Apalachicola. Hawkins hailed from the Panhandle, had federal experience through his service as district attorney, and his judicial qualifications would have eased the transition from Bronson's tenure. However, Florida's senior senator, David Yulee, sponsored McQueen McIntosh, a . . . radical states' rights Democrat who had moved to Jacksonville from Georgia in 1850 and had close connections to the railroad industry in the eastern and central regions of the state. On February 27, 1856, President Franklin Pierce, at the urging of his attorney general, Caleb Cushing, appointed McIntosh to the vacancy.⁴²

Little is known about McIntosh's time on the federal bench, for almost none of his opinions have survived.⁴³ An 1859 newspaper article, however, provides some insight into his docket:

The U.S. Court for the Northern District of Florida was also in session at Apalachicola, the Hon. McQueen McIntosh, presiding. The [*Montgomery Weekly*] *Advertiser*, of the 11th, says:

There will be several important cases for consideration of the court, as presented in the case of the supposed slaver E.A. Rawlins, for an infringement of the statutes of the United States in such cases made and provided. Also, for an alleged murder said to have been committed on the high seas upon a person designated as the "Spanish Captain" of said bark, by the first, second and third mates, and a person called Delameyer as principal, and the alleged American captain, Hayden, as an

⁴² HALL & RISE, *supra* note 5, at 24 (footnotes omitted).

⁴³ In their book, Hall and Rise summarize Bronson's opinion in *Ferreira v. United States* (1851), which involved a claim for damages arising from General George Matthews's 1812 attempt to foment a rebellion against Spain while Florida was a Spanish colony. See HALL & RISE, *supra* note 5, at 25-26. As they explain, a copy of the opinion is available in the P.K. Yonge Library of Florida History at the University of Florida. *Id.* at 208 n.12.

accessory before the fact, if the Grand Jury should succeed in bringing in indictments against them.⁴⁴

Three days after Abraham Lincoln won the 1860 presidential election, McIntosh announced that he planned to resign his seat in protest.⁴⁵ By the time he made good on his threat (January 3, 1861),⁴⁶ McIntosh had been elected to serve as a delegate to Florida's secession convention, more formally known as the Convention of the People of Florida ("CPF").⁴⁷ At the CPF, McIntosh took a leading role:

Former federal judge McQueen McIntosh introduced a series of resolutions that came to define the purpose of the Convention itself. First, the resolution made clear that the Florida delegation believed secession to be a constitutional right of the states to enact as they saw fit. Because of the supposed constitutionality of secession, the elected representatives at the Convention were therefore tasked with the responsibility of this severance. In what would be the most important wording of the resolution, the delegation found "just and proper cause" for Florida to secede from the Union. The passage of the McIntosh resolutions was the final push toward immediate secession. . . . By January 10, the final Ordinance of Secession had passed the Convention by a vote of 62 to 7. [When Convention President John C. McGehee] announced [that] the Ordinance [had] passed, marked in the Convention Journal of Proceedings at 12:22 p.m., Florida became the third state to declare secession from the Union.⁴⁸

In addition to agreeing to secede and adopting a new state constitution, the CPF's delegates enacted various ordinances. Ordinance No. 17, dated January 19,

⁴⁴ *Later [News] from the Florida Ports*, DAILY PICAYUNE (New Orleans), May 19, 1859, at 1. *See also Arrest of Florida Outlaws*, GLASGOW WEEKLY TIMES (MO), Nov. 8, 1860, at 2 ("[F]orty or fifty of the outlaws in the late Calhoun county disturbances [have] been arrested by the authorities and confined in the jails of Apalachicola and Marianna. . . . Hon. McQueen McIntosh, of the U.S. District Court, and Hon. J.J. Finley, of the the State Judiciary, [have been] untiring in their endeavors to restore tranquility."); *Florida Judges and the Slave Trade*, DAILY PICAYUNE (New Orleans), June 16, 1859, at 1 (reporting on accusations that McIntosh was "acting in collusion with the slave traders on [Florida's east] coast").

⁴⁵ *See By Telegraph to Brooklyn Daily Eagle: Georgia and Florida*, BROOKLYN DAILY EAGLE (NY), Nov. 9, 1860, at 3 ("The [Montgomery Daily] Mail publishes a despatch from Apalachicola [dated Nov. 6, 1860] stating that McQueen McIntosh, Federal Judge for Florida, will not hold office under Lincoln.").

⁴⁶ *See McIntosh FJC Biography*, *supra* note 41. *See also Important [News] from the South*, N.Y. HERALD, Jan. 10, 1861, at 8.

⁴⁷ For a detailed look at the CPF, see Ralph A. Wooster, *The Florida Secession Convention*, 36 FLA. HIST. Q. 373 (1958). As Wooster explains, McIntosh owned 63 slaves. *Id.* at 383. Only eight delegates (out of a total of 69) owned more slaves. *Id.* at 383-85.

⁴⁸ Michael Paul McConville, "The Politics of Slavery and Secession in Antebellum Florida, 1845-1861," at 88-89 (footnote omitted) (unpublished M.A. thesis, University of Central Florida, Summer 2012), available at <https://stars.library.ucf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3221&context=etd>.

1861, abolished the USDC-SDF and transferred its authority to a new court known as the “Court of Admiralty for the Southern District of Florida.”⁴⁹

In full, Ordinance No. 17 read as follows:

Be it ordained by the People of the State of Florida in Convention assembled, That there shall be established a Court at Key West in this State, which Court shall have and exercise Admiralty jurisdiction only; that the laws of the late United States applicable to, and heretofore governing the District Court of the United States for the Southern District of Florida, be and the same are hereby adopted for the control and government of said Court; that said Court shall be known as the Court of Admiralty for the Southern District of Florida, and that the limits of its jurisdiction shall be the same as were prescribed by an Act of the late Federal Congress, Approved February 28, 1847.

2. *Be it further ordained,* That there shall be one Judge of said Court, with a salary of twenty-five hundred dollars per annum, who shall be appointed by the Governor of this State, by and with the advice and consent of the Senate thereof, who shall have power to appoint a Clerk of said Court, which said clerk, before entering upon the duties of his office, shall enter into a bond in the sum of two thousand dollars to be approved by the said Judge, conditioned for the faithful performance of his duties.

3. *Be it further ordained,* That a Marshal of said Court shall be appointed in like manner as the Judge thereof, who, with the Clerk of said Court, shall receive the same fees and emoluments as were prescribed by an act of the late Federal Congress, approved February 26th, 1853. The said Marshal shall enter into a bond in the sum of twenty thousand dollars, conditioned for the faithful performance of his duties, and the payment of all monies coming into his hands under the order of the Court, which bond shall be approved by the Judge thereof.

4. *Be it further ordained,* That the said Judge shall reside at Key West, that the Court shall be always open for the transaction of admiralty business, and that appeals may be taken from the decrees thereof to the Supreme Court of this State, in like manner as appeals from the Circuit Courts of this State are now prosecuted.

5. *Be it further ordained,* That whenever the Provisional or permanent Government of a Southern Confederacy shall establish a Court of Admiralty and foreign jurisdiction for the Southern District of Florida, this ordinance shall cease to be of any force and effect.⁵⁰

⁴⁹ See ROBINSON, *supra* note 20, at 21. The incongruity of a state convention abolishing a federal court apparently gave none of the delegates pause.

⁵⁰ JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF THE PEOPLE OF FLORIDA, BEGUN AND HELD AT THE CAPITOL IN THE CITY OF TALLAHASSEE, ON THURSDAY, JANUARY 3, A.D. 1861, at 105-06 (1861).

As the legislative record reveals, Ordinance No. 17 was proposed by McIntosh.⁵¹ As originally written, it required a 1% fee to be imposed on wrecking awards, but this provision was dropped after an objection was raised by William Pinckney, one of Monroe County's three delegates.⁵²

A heated discussion then took place over section 5. Samuel B. Stephens, one of Gadsden County's three delegates, proposed that its wording be changed to:

Be it ordained, That the General Assembly of the State of Florida are hereby authorized to establish a Court of Admiralty for the Southern District of the State of Florida, to continue until otherwise provided for by the permanent government of the Southern Confederacy.⁵³

When Stephens's proposal passed by a vote of 25 to 22,⁵⁴ John Beard, one of Leon County's five delegates, immediately moved for reconsideration.⁵⁵ In response, Stephens made a motion to table Beard's motion, which failed 42-4.⁵⁶ Lewis A. Folsom, one of Hamilton County's two delegates, then made a motion to adopt the ordinance's original wording, which passed 42-5.⁵⁷

A short time later, Governor Madison S. Perry tapped Stephen R. Mallory to head the new court:

Hon. E. [sic] Marvin, late U.S. Judge at Key West, has made his threats that he would not recognize the Admiralty Jurisdiction of the Republic of Florida, and that every citizen of our State who, after its secession, refused to recognize the laws of the United States, should be treated as a traitor. The Governor has accordingly very properly and promptly removed him, and appointed S.R. Mallory Admiralty Judge in his stead.⁵⁸

Mallory, however, declined the appointment,⁵⁹ which caused Perry to turn to McIntosh:

⁵¹ See CONSTITUTION OR FORM OF GOVERNMENT FOR THE PEOPLE OF FLORIDA, AS REVISED AND AMENDED AT A CONVENTION OF THE PEOPLE BEGUN AND HOLDEN AT THE CITY OF TALLAHASSEE ON THE THIRD DAY OF JANUARY, A.D. 1861, TOGETHER WITH THE ORDINANCES ADOPTED BY SAID CONVENTION 82-84 (1861) [hereinafter FORM OF GOVERNMENT].

⁵² *Id.* at 83.

⁵³ *Id.* at 83-84.

⁵⁴ *Id.* at 84.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ "Secession Items," BUFFALO MORN. EXPRESS, Feb. 11, 1861, at 2 (reporting on a story in the *East Floridian*, a newspaper in Fernandina, whose headline had been "One Traitor Removed").

⁵⁹ Mallory was a reluctant Confederate, which probably explains why he turned down Perry's appointment. Nevertheless, when called upon to become the CSA's Secretary of the Navy, Mallory accepted and remained in this office for the duration of the war. For a profile of Mallory, see RODMAN L. UNDERWOOD, STEPHEN RUSSELL MALLORY: A BIOGRAPHY OF THE CONFEDERATE NAVY SECRETARY AND UNITED STATES SENATOR (2005).

We [the *Apalachicola News*] have the pleasure of announcing to the public the appointment of this gentleman [McQueen McIntosh], by His Excellency, Gov. Perry, as Judge of the Court of Admiralty for the Southern District of Florida. This appointment is considered as a very judicious one, and meets the hearty approval of all those of our citizens who appreciate the ability of Judge McIntosh. Hon. [Stephen] R. Mallory, late United States Senator from this State, was first appointed to this position, by Gov. Perry, but for causes as yet unknown to us, he declined the appointment.

We understand that Judge McIntosh will proceed as early as possible to Key West, to assume the duties of his office, and we are satisfied that he carries with him the esteem of a grateful and approving constituency. We congratulate the citizens of Key West on this appointment, and commend our friend Judge McIntosh, to their warmest hospitalities.⁶⁰

By its own terms, Ordinance No. 17 expired upon the creation of the CAMJ.⁶¹ Nevertheless, on April 24, 1861, the CPF passed Ordinance No. 32, which repealed numerous prior ordinances, including Ordinance No. 17.⁶²

C. ATTEMPT TO OPEN

In May 1861, McIntosh traveled to Key West to take up his duties as judge of the CAMJ. The trip proved disastrous, however, and McIntosh barely escaped with his life:

When Florida left the Union, the Federal government had a gunboat and two companies of artillery at the Key West Naval Base, sufficient to enforce beyond question United States authority on the island. But the soldiers could not control sentiment, and the people were soon divided into pro-Secessionists and pro-Unionists.

The only United States civil officials at Key West who did not resign their offices after Florida seceded were District Judge William Marvin [of the USDC-SDF] and Charles Howe, Collector of Customs. Neither the state nor the Confederate government recognized the authority of Judge Marvin or Collector Howe.

Early in May, 1861, McQueen McIntosh, a secession leader, was sent to Key West as the new state appointee to the bench occupied by Marvin. McIntosh demanded that Marvin relinquish the office and surrender all records and papers pertaining to the post of district judge. Judge Marvin refused, [and only] his [subsequent] personal intervention with the Union officers kept McIntosh from being arrested. Instead, McIntosh was allowed to leave the island.

⁶⁰ *Hon. McQueen McIntosh*, CHARLESTON DAILY COURIER (SC), Feb. 21, 1861, at 1.

⁶¹ See *supra* text accompanying note 50 (under § 5).

⁶² See FORM OF GOVERNMENT, *supra* note 51, at 45-46.

The last hope of the Confederacy to assert peaceably its authority at Key West was now gone, and because the island was never invaded by the Confederacy it remained Union territory throughout the war.⁶³

As has been explained elsewhere, the meeting between McIntosh and Marvin occurred on Monday, May 12, 1861.⁶⁴ In all likelihood, it took place in the “Stone Building,” which in 1859 had become Key West’s third federal courthouse.⁶⁵

⁶³ JOHN E. JOHNS, *FLORIDA DURING THE CIVIL WAR* 155 (1963) (paragraphing inserted for improved readability). See also HALL & RISE, *supra* note 5, at 32 (“When McIntosh arrived in early May he discovered, to his horror, that Union forces had completely occupied Key West. . . . This considerable display of force convinced McIntosh to return to safer harbors.”). McIntosh needed Marvin’s help to leave the city (and avoid being arrested while doing so) because “there was an order in force prohibiting non-residents from going or coming without the authority of the commanding officer, unless they would take [an] oath of allegiance [to the United States].” BROWNE, *supra* note 38, at 93.

⁶⁴ In his book, Browne reproduces a letter that U.S. Brevet Major William H. French sent to U.S. Brevet Captain George L. Hartsuff on the day McIntosh left Key West (Friday, May 16, 1861). See *id.* at 218-19. According to French, McIntosh arrived in Key West on Sunday, May 11, 1861, and planned to hold the first session of the CAMJ on Tuesday, May 13, 1861. McIntosh used the intervening day (Monday, May 12, 1861) to have his meeting with Marvin. McIntosh then spent the next four days cooling his heels, waiting for permission to leave the city.

An anonymous letter in the *New York Herald*, dated Wednesday, May 14, 1861, disagrees slightly with this timeline, reporting that McIntosh arrived in Key West on Monday, May 12, 1861:

The schooner Dolphin, Filer [in command], arrived on the 12th, from Cedar Key [north of Tampa], having as [a] passenger Judge McQueen McIntosh, lately appointed Judge of the Admiralty Court of Key West by the Southern Confederacy, and John L. Tatum, District Attorney of the same court. We understand that Judge McIntosh *will not attempt to organize his court at Key West, but will speedily leave the city*, which is now in the complete possession of the United States authorities.

Our Key West Correspondence, N.Y. HERALD, May 21, 1861, at 8 (italics in original).

⁶⁵ The Stone Building, at present-day 226 Whitehead Street, served as the court’s home from 1859 to 1885:

Shortly after the admission of Florida to the Union, the United States court was moved from the county court house to a . . . building belonging to Wall & Pinckney, fronting on Wall street[.] This building was destroyed by fire in 1859, and the court moved to the “Stone building” situated on the corner of Caroline and Whitehead streets. . . . In 1885 [the court] moved to a building then belonging to Mr. John W. Sawyer, on the corner of Front and Fitzpatrick streets. . . .

[The Stone Building] is one of the oldest buildings in Key West, and for many years had the unique distinction of being the only one not built entirely of wood. It was known as “The Stone Building,” [because it was] built [out] of cement from a cargo of that material wrecked at Key West. It is a quaint three-story structure with a high pitched roof, having a narrow balcony supported by consoles of solid cement, extending the entire side on Whitehead street. On the gable end was once a similar balcony, but it has been taken down, and only the consoles remain. Above the side balcony

The press quickly spread word of McIntosh's misadventure, with the *National Republican* reporting:

McQueen McIntosh, of the Confederate States, and appointed to the position of judge of this district, arrived [in Key West] a few days [ago], and, finding the island in the quiet possession of the United States, has concluded it best to leave to-day [May 16, 1861]. Himself and the [CSA's] district attorney, J.L. Tatum, sail for Tampa this evening.

Judge Marvin, of the United States court, having organized his court, is ready to transact any business that may be brought before it.⁶⁶

A short time later, the *Montgomery Weekly Advertiser* wrote:

Hon. McQueen McIntosh, Judge of the Admiralty Court at Key West, reached [Tallahassee] on Thursday [May 23, 1861], direct from [Key West]. We learn from him that the Federalists there carry things with a high hand. The [pro-secession newspaper] *Key of the Gulf* had been suppressed, and its editor, Mr. Ward, forced to leave. The mail steamer *Suwannee*, Captain Forbes [in command], had been seized, and pressed into Lincoln's service. The yacht *Wanderer*, which had gone into Key West for the purpose of procuring a new register, was also taken possession of and refused permission to leave. No secret was made of the intention to retaliate for the capture of the *Atwater*, and preparations appeared to be making for a foray along the coast.

Judge McIntosh left Key West in a sailing vessel, which although leaving with full permission, was brought to by a shot from the [U.S.S.] *Crusader*, boarded by an officer and searched, and then allowed to pursue her voyage without further molestation.⁶⁷

In its coverage, the *New York Times* displayed unabashed glee in McIntosh's plight:

Poor Judge Mackintosh [sic], "Confederate States Admiralty Judge for the Southern District of Florida," arrived here a fortnight ago. He probably had not heard [news] from [Key West] since [U.S.] Capt. [Montgomery C. Meigs's] arrival [in the city in November 1860]. On learning the actual state of affairs, he [claimed] he had come for his health; but as he didn't find it healthy, he soon went away again, and took his District-Attorney with him. He was narrowly watched, and if he had attempted to discharge

is a large plaster mask of the builder, Mr. John G. Ziriak, who kept the foremost bakery of his day. Before it acquired the cognomen of the "Stone Building" it was known as the "Ziriak Building."

Id. at 68, 75.

⁶⁶ *Key West Loyal*, NAT'L REPUB. (DC), May 27, 1861, at 2.

⁶⁷ *Late [News] from Key West*, MONTGOMERY WEEKLY ADVERTISER (AL), June 5, 1861, at 4.

any of the functions of his office, he would have been committed for treason. . . .

Judge Mackintosh, of whom I have spoken, denounced him [Marvin] as a traitor in the Florida Convention, and volunteered to pull the rope at his execution. Circumstances alter cases. Judge Mackintosh, when here the other day, was compelled to ask Judge Marvin to use his influence with the military authorities to induce them to permit him (Mackintosh) to go away.⁶⁸

In his autobiography, Marvin does not mention his meeting with McIntosh. He does, however, summarize the period:

Although I had always been a [D]emocrat in my politics, and resided at this time in the most Southern town the United States, and was a slave-owner to the extent[,] at least, of owning my own domestic servants, yet, I had never accepted the views of John C. Calhoun and other Southern leaders, touching the easy dissolubility of the federal union of the States. It seemed to me that the Union was intended by the framers of the Constitution to be perpetual, and, that the movement in favor of Secession that was being inaugurated, if persisted in, could end in nothing else but civil war and the ultimate subjugation of the seceding states; I, therefore, opposed the Secession Movement with all my might.

I announced myself as a candidate on [the] Union side in the County of Monroe, for election as a delegate to the State Convention [*i.e.*, the CPF] which had been called to meet in Tallahassee in January, 1861. I was beaten at the election by a secessionist. The Convention passed an Ordinance declaring Florida to be out of the Union and an Independent Nation. The interval of the time between the date of that Ordinance and the time when the Civil War began, was a period in the history of my life of great mental anxiety and suffering.

It was impossible during all this time for any person living in the South to form any opinion as to whether the Government at Washington would acquiesce in the secession movement or not. It was generally claimed by the leaders in the South that Secession was a peaceable measure and in accordance with the Constitution. The State authorities at Key West were secessionists; Unionists were liable to bad treatment from them. Many of my dearest friends, including the Clerk of my Court [Joseph B. Browne], the Marshal [Fernando J. Moreno], and the District Attorney [John L. Tatum] turned [into] secessionists. During this period of painful anxiety, I found great comfort in the society of my little family then consisting of my sister Mrs. Pinckney, my niece Dora, and my daughter Hattie. The Rev. Osgood E. Herrick, rector of St. Paul's Church, Robert Campbell, George Allen, Major Hunt, Captain John Brannan, U.S.A. and Captain

⁶⁸ "ISAM," *Affairs at Key West*, N.Y. TIMES, June 17, 1861, at 3 (paraphrasing slightly altered for improved readability).

Craven of the Navy, contributed a good deal by their loyal sentiments and companionship in misery, to make my life endurable. It was, however, the saddest period of my life.

The commencement of the war ended all this uncertainty. It was now certain that the Union was to be maintained, the Country was to be saved. I saw no other end than victory on the side of the Government of the United States. Soon after the war broke out, the President appointed a new Marshal for the Court, [James C.] Clapp, and a new District Attorney [Thomas J. Boynton], and I appointed a new Clerk [George D. Allen]. The Court was thus again organized and in good condition for work. The President, also, authorized [William H. French,] the officer in command of the troops at Key West[,] to declare martial law whenever he thought it best to do so. As soon as the existence of this order was made known, the leading secessionists left the Island and went to the mainland.

The Unionists were now in the ascendency and quiet and good order prevailed. I soon had an immense amount of work to do in deciding Prize cases. [M]ost of the vessels captured for attempting to break the blockade of the Ports in the Gulf Mexico and at Charleston and Savannah were brought to Key West for adjudication, and I had plenty of work to do up to the time of my resignation in 1863. I resigned because my health had become much impaired by long residence in a hot climate, mental anxiety and overwork. I was, probably, the only Federal Judge South of the Potomac and the Ohio, (if we except Justice [James M.] Wayne of the Supreme Court [a Georgian appointed by President Andrew Jackson in 1835]) who continued to perform his official duties during the war.⁶⁹

⁶⁹ Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 FLA. HIST. Q. 179, 213-14 (1958) (footnote omitted) (paraphrasing inserted for improved readability). In 1865, at the request of President Andrew Johnson, Marvin (1808-1902), originally from Fairfield, New York, returned to Florida to run the state until new elections could be held. *Id.* at 215. See also *Provisional Governor of Florida*, N.Y. TIMES, July 15, 1865, at 1.

At least in the North, Marvin's handling of his wartime docket, which consisted primarily of prize cases, was much lauded, with one newspaper commenting:

Hon. William Marvin is the judge of this court [the USDC-SDF], and [he] decides the cases [based on the] evidence deduced from the examination of witnesses brought before the Prize Commissioner, George D. Allen, Esq. . . . The most difficult suits brought before the court are those where the claimants attempt to prove their neutrality. All such [ships] have so-called British provisional registers, and it requires careful discrimination in the decision of such cases, to bring violators of the blockade to justice, and still avoid leaving troublesome questions behind for diplomatists to settle. Judge Marvin is abundantly able to do this; and his decisions, therefore, have given very general satisfaction.

The List of Suits Now Before the United States District Court for Adjudication—Judge Marvin Presides at the Bench—Value of the Captures Nearly Half a Million [] Dollars, N.Y. HERALD, Apr. 1, 1862, at 7. See also HALL & RISE, *supra* note 5, at 33-36 (offering similar praise).

D. NEAR DISSOLUTION

McIntosh's disastrous trip led to calls to dissolve the CAMJ. As Robinson explains, only the CSA's pride saved the court:

In the fall following Judge McIntosh's unsuccessful effort to hold court at Key West, one of the Florida deputies, Jackson Morton, moved [on November 29, 1861] to have the Committee on the Judiciary inquire into the expediency of rescinding the act creating the Court of Admiralty. On December 23, 1861, the Committee recommended that the act be repealed, and Congress repealed it at once. When the deputies had had an opportunity to think the matter over during Christmas week, they apparently concluded that the abolishment of the court might be construed as a concession in favor of Union sovereignty at Key West, for upon the reopening of Congress after New Year [January 2, 1862] the abrogation of the court was reconsidered and withdrawn by unanimous consent.⁷⁰

Despite being unable to take his seat, for the rest of the war McIntosh remained a CSA judge and continued to collect his salary. As Robinson further explains:

On account of the continuous occupation of Key West by the enemy, the court was never able to sit there. Judge McIntosh, however, continued to draw his pay from the [CSA's] Attorney General's Office until the end of the Confederate government, and on at least one occasion he sat on the bench by interchange.

When Judge [George S.] Hawkins, of the [CSA's] District of Florida, was disqualified in a particular case, [McIntosh] held a special term of [the] court at Marianna in July 1863. Even in his old district (where he had presided for five years as United States judge), the nature of the Key West court was not fully understood. At the opening of the court [session] in Marianna, [McIntosh] was announced as the "Judge of the District Court for the District of Key West." [McIntosh] made no correction and even signed the minutes prepared for his signature as "C.S. Judge Southern Florida, sitting in Western Florida."

Though no other examples of [McIntosh's] Confederate judicial records have been found, it is within the range of possibility that Judge McIntosh held court at other places in his district than Key West, under his statutory authority [under section 3 of the CAMJ statute] to hold extra sessions "at such places in said district as occasion may require."

⁷⁰ ROBINSON, *supra* note 20, at 306-07 (citing CSA JOURNAL, *supra* note 28, at 491 (proposed repeal), 603 (repeal), 635 (reinstatement)). Robinson gives the last *Journal* page cite as "605," but this clearly is a typographical error in his book. Morton's motivation for wanting the CAMJ abolished is unknown—as his biographer has noted, "Morton was somewhat unpredictable and appears to have been easily influenced by those around him." BRIAN R. RUCKER, JACKSON MORTON: WEST FLORIDA'S SOLDIER, SENATOR, AND SECESSIONIST 37 (1990).

....

There must have been plenty of maritime business for [McIntosh] to settle, at, say, Hillsborough, a now extinct village which lay on the [east] coast about halfway between the present cities of Miami and Palm Beach. This village was only about fifty miles from the Bahamas, and small sloops and schooners were in the constant habit of sneaking cargoes of cotton across the Straits of Florida to British colonial markets. Then, too, there were *balandras* and *goletas* from Cuba which trafficked through the blockade. No traces of sittings [by McIntosh] in any of these out-of-the-way places have been found, but the personnel of the court was continued on the roster of the Confederate States judiciary despite the imbroglio at Key West, and it would have been ready to hear and determine maritime cases there had the war ended differently.⁷¹

III. ADDITIONAL PROBLEMS

Because the CAMJ never sat, previous commentators generally have failed to consider the various administrative, procedural, and substantive problems that would have arisen had McIntosh's trip gone better. At best, these problems would have taken time and ingenuity to resolve. At worst, they would have sunk the entire enterprise.

A. JURISDICTION

As will be recalled, five days after establishing the CAMJ the CSA's Provisional Congress enacted the CJA.⁷² Section 39 of the CJA provided:

The said district courts shall have original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the revenue laws or laws of navigation and trade of the Confederate States, when the seizures or cause of complaint arises on waters which are navigable from the sea by vessels of one hundred or more tons burden, within their respective districts as well as upon the high seas; saving to suitors in all cases the right of a common law remedy, where the remedy at common law is ample and complete.

And said district courts, as courts of admiralty, shall be deemed always open for the purpose of filing libels, petitions, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making all interlocutory orders or rules which may be necessary.

And the laws of the United States and the rules of court in reference to admiralty proceedings in force in the admiralty courts of the United States of America, on the twentieth day of December, one thousand eight

⁷¹ ROBINSON, *supra* note 20, at 307-08 (footnotes omitted). As explained *infra* note 77, George S. Hawkins became Florida's second CSA district court judge in 1862.

⁷² See *supra* note 8 and accompanying text.

hundred and sixty, so far as the same may be applicable, and are not inconsistent with the constitution and laws of the Confederate States, are hereby continued in full force and effect in the courts of the Confederate States, until altered or repealed by law.⁷³

In admiralty cases arising in South Florida, this language would have caused considerable mischief, for any dispute cognizable in the CAMJ also would have been cognizable in the CSA's District Court for the District of Florida (headquartered in Tallahassee). This open invitation to litigants to forum shop, and the proverbial "race to the courthouse" it would have engendered, would have been difficult to control. In 1824, the U.S. Supreme Court had adopted the "first-to-file" rule,⁷⁴ under which the first court seized of a case is expected to see it through to its conclusion.⁷⁵ Due to the CJA's December 20, 1860 cut-off date, the first-to-file rule applied to all CSA cases.⁷⁶

It is possible, of course, that McIntosh and his counterparts on Florida's CSA district court would have come to some sort of understanding.⁷⁷ For example, the

⁷³ PROVISIONAL CONGRESS STATUTES, *supra* note 1, at 82 (paragraphing inserted for improved readability).

⁷⁴ *See* *McIver v. Smith*, 22 U.S. (9 Wheat.) 532 (1824).

⁷⁵ In modern times, of course, various procedural safeguards have been adopted to prevent the rule from being abused. *See, e.g.*, 28 U.S.C. § 1404(a) (permitting federal judges to order inter-district transfers "[f]or the convenience of parties and witnesses, [and] in the interest of justice").

⁷⁶ Because it was not designed specifically for admiralty cases, there is a chance that the first-to-file rule would not have been deemed an "admiralty rule." As a practical matter, however, this merely would have caused a pivot to the CSA's general "reception statute." It adopted all U.S. laws (except those "inconsistent with the Constitution of the Confederate States") in effect on November 1, 1860. *See* An Act to Continue in Force Certain Laws of the United States of America, PROVISIONAL CONGRESS STATUTES, *supra* note 1, at 27.

⁷⁷ During its existence, the CSA's District Court for the District of Florida had two judges. The first was Jesse J. Finley, who served from March 1861 to March 1862 (when he resigned to join the CSA's Army). The second was George S. Hawkins, who took Finley's place in April 1862 and remained on the bench for the duration of the war. For accounts of their service, see HENRY PUTNEY BEERS, GUIDE TO THE ARCHIVES OF THE GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 44-46 (1968). *See also* ROBINSON, *supra* note 20, at 153-54.

As Beers points out, *see supra* at 46, the surviving records of the CSA's District Court for the District of Florida were transferred in 1953 to the Federal Records Center in East Point, Georgia as "Record Group 21." Today, these materials are described as follows:

21.11.3 Records of the Confederate States District Court for the Northern [sic] District of Florida

Textual Records (in Atlanta): Minute books and execution dockets of the Middle Division (Marianna), 1861-64. Case files, minute books, and dockets of the Middle Division (Tallahassee), 1861-65. Minute books of the Western Division (Pensacola), 1864. Minute books and a judgment docket of the Apalachicola Division, 1862-64.

Records of District Courts of the United States (Record Group 21), 1685-1993, NATIONAL ARCHIVES OF THE UNITED STATES, at <https://www.archives.gov/research/guide-fed-records/groups/021.html#21.11.3>.

latter judges might have agreed to decline to hear any cases that also were within the CAMJ's purview, perhaps on the ground of *forum non conveniens*.⁷⁸ Whether such an arrangement would have been legal is an open question.⁷⁹ Alternatively, either of the CSA's Congresses could have passed a law making the CAMJ a full district court, thereby eliminating the problem entirely.⁸⁰

B. GOVERNING LAW

Although it adopted the admiralty laws of the United States as they stood on December 20, 1860,⁸¹ section 39 of the CJA further provided that such laws would remain in force only for as long as they were not "altered or repealed by law."⁸² It remains unclear whether the phrase "by law" refers to "statutory law" or also includes "common law." If the former, only the CSA's Provisional Congress (and, later, the CSA's Permanent Congress) would have been able to make changes in the CSA's admiralty laws. If the latter, however, the CSA's district judges also would have had this power.⁸³ McIntosh, of course, would have been bound by whichever one of these two views prevailed due to section 9 of the CAMJ's enabling statute.⁸⁴

⁷⁸ By 1860, U.S. admiralty courts had adopted, and were applying, the basic principles of the *forum non conveniens* doctrine. See, e.g., *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Jerusalem*, 13 F. Cas. 559 (C.C.D. Mass. 1814) (No. 7,293) (Story, Cir. J.); *Bucker v. Klorkgeter*, 4 F. Cas. 555 (S.D.N.Y. 1849) (No. 2,083); *Cochran v. McLean*, 5 F. Cas. 1142 (S.D.N.Y. 1839) (No. 2,927A); *Willendson v. The Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682).

⁷⁹ Rule 46 of the U.S. Supreme Court's 1844 Admiralty Rules arguably would have countenanced such an arrangement: "In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty." The 1844 Admiralty Rules, formally known as the "Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction on the Instance Side of the Court," can be found at 44 U.S. (3 How.) iii-xiv (1845).

Had it been able to sit, the CSA's Supreme Court presumably would have adopted its own version of the 1844 Admiralty Rules, as it was authorized to do by § 43 of the CJA. See PROVISIONAL CONGRESS STATUTES, *supra* note 1, at 83 ("The Supreme Court shall have power from time to time to make all such rules and regulations as it may deem needful for the orderly and correct dispatch of cases not inconsistent with the rules of law. . .").

⁸⁰ Robinson expresses surprise that this was not done. See ROBINSON, *supra* note 20, at 301-02.

⁸¹ For a detailed description of these laws, see, e.g., ALFRED CONKLING, THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES (2d. ed. 1857).

⁸² See *supra* text accompanying note 73.

⁸³ Robinson takes the latter view. See ROBINSON, *supra* note 20, at 57 ("The inference is very strong that the [CSA's] Congress did not intend to weaken, materially at any rate, the maritime powers of the [CSA's] district courts.").

⁸⁴ See *supra* text accompanying note 33 ("SEC. 9. [The CAMJ] shall conform to the practice of the district courts when exercising admiralty and maritime jurisdiction. . .").

C. PUBLICATION OF DECISIONS

One of the most serious problems faced by the CSA's district courts, and one that likewise would have plagued the CAMJ, was the lack of a reliable means for publicizing decisions:

With paper in short supply, the confederate courts were forced to use the forms that had been printed for their predecessors, striking, whenever necessary, the word "United" and substituting in its place the word "Confederate."

As matters turned out, this was only the beginning of their problems: Nobody paid a great deal of attention to the Confederate district courts which, by the [CSA's] failure to create a Supreme Court, were kept hanging in the air. They had no final jurisdiction under the Constitution and laws, and at best had only concurrent jurisdiction with the state courts over which they had no authority, appellate or otherwise. In most of the districts they scarcely functioned at all, and since their decisions were only scatteringly published in the newspapers, little was known of them at the time and far less today.⁸⁵

D. APPEALS

In addition to not having a Supreme Court,⁸⁶ the CSA lacked intermediate appellate courts. Thus, had McIntosh been able to hear cases at the CAMJ, dissatisfied litigants would have had nowhere to go to contest his decisions.⁸⁷

IV. CONCLUSION

Although it never sat, the CAMJ deserves more attention than it has received. In addition to shedding light on how the CSA's leaders viewed a host of topics, it remains one of only two American courts ever created as an admiralty court.⁸⁸

⁸⁵ Robert W. Lee, "Confederate Courts," in *Florida's Other Courts: Unconventional Justice in the Sunshine State* 77, 79 (Robert M. Jarvis ed. 2018) (footnote omitted) (quoting Hamilton, *supra* note 17, at 433).

⁸⁶ See *supra* note 15 and accompanying text.

⁸⁷ Under § 6 of the CAMJ's enabling statute, see *supra* text accompanying note 33, appeals in admiralty cases were supposed to go directly to the CSA's Supreme Court. See also ROBINSON, *supra* note 20, at 47-48. In contrast, in the U.S. system admiralty appeals went first to the circuit courts and then to the U.S. Supreme Court. See ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 212 (2d ed. 2002) (explaining that this procedure was changed in 1863 to allow "appeals [to] be taken directly to the Supreme Court if the value of the vessel exceeded two thousand dollars or where the District Court judge certified that the case involved a question of national importance.").

⁸⁸ The other such court, of course, was Florida's interregnum admiralty court, discussed *supra* notes 49-62 and accompanying text. I am discounting the vice-admiralty courts that existed prior to the Revolutionary War because they were British courts and, despite their name, focused primarily on revenue collection. See CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960).

A KEY WEST “JACK-OF-ALL-TRADES”: THE STRANGE LIFE, AND PECULIAR DEATH, OF DR. DANIEL W. WHITEHURST

Robert M. Jarvis*

ABSTRACT

In 1845, lawyer-turned-physician Daniel W. Whitehurst, originally from Virginia, moved to Key West. By the time of his death in 1872, Whitehurst had served as the city’s mayor, state senator, and captain of its rebel guard. Nevertheless, Whitehurst now is an unknown figure. Buried with him is his cause of death, which may have been suicide.

KEYWORDS

Africa, Confederate States of America, Cuba, Disease, Early Newspapers, Florida Keys, Florida Politics, Forts, Key West, Medical Education, Slavery, Spain, St. Augustine (Florida), Suicide, U.S. Civil War

CONTENTS

I. INTRODUCTION	256
II. CORRECTIONS	256
A. Who Was Who Entry	256
B. McMurtie’s Article	257
C. Smiley’s Essay and Wickman’s Book	260
D. Family Papers	268
E. Nichols’s Report	271
III. ADDITIONS	281
A. Expulsion from West Point	282
B. Election to the Florida Senate	284
C. Election as Mayor of Key West	287
D. Death	287
IV. CONCLUSION	291

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I. INTRODUCTION

On a web site listing Key West's dead, Daniel Winchester Whitehurst, a 19th century Florida doctor, explorer, journalist, lawyer, politician, and soldier, is celebrated as a "jack-of-all-trades."¹ Yet despite his diverse talents, Whitehurst does not have a Wikipedia page;² there is no known picture of him;³ and his headstone, erected long after his death, contains incorrect information.⁴ Moreover, while a scattered handful of sources recount his exploits, almost all contain errors of one sort or another. Accordingly, this article seeks to set matters straight. To do so, it first corrects what the existing sources say about Whitehurst. It then provides important new information about his education, political career, and death.

II. CORRECTIONS

A. WHO WAS WHO ENTRY

Perhaps the easiest source to find about Whitehurst is his short entry in *Who Was Who in Florida* ("WWWF"). After giving the years of his birth (1807) and death (1872), it summarizes his life as follows:

A native of Virginia, [Whitehurst] came to Florida and settled in St. Augustine. He served as a major during the Second Seminole War of 1835-1842. After the war he practiced law and became editor of the *St. Augustine News*. Whitehurst then studied medicine and in 1843 received his degree as a medical doctor from New York University. He moved to Key West to become post physician at Fort Taylor and later was the post physician at Fort Jefferson. While serving at Fort Jefferson he assisted the famous Dr. Mudd during the terrible yellow fever epidemic of 1866 [sic].⁵

¹ *Whitehurst, Daniel Winchester (1808-1872) – Jack of All Trades*, CITY CEMETERY, KEY WEST, FLORIDA, PART 3, at <http://historichouston1836.com/city-cemetery-part-3-key-west-florida/>. This web site misidentifies Whitehurst's birth year, listing it as "1808" rather than "1807."

² Whitehurst does have a page on Ancestry.com, but it is rather sparse and also misstates his birth year. See Alison R. Hardage, *Daniel Winchester Whitehurst 1808-1872*, ANCESTRY.COM, at <https://www.ancestry.com/family-tree/person/tree/69316113/person/36288915359//story>.

³ See, e.g., Albert C. Manucy, PAGES FROM THE PAST: A PICTORIAL HISTORY OF FORT JEFFERSON 22 (1999) (image of a blank box with the notation: "No portrait of Dr. Whitehurst has been found.").

⁴ Whitehurst's headstone includes the names of his wife Henrietta and oldest daughter Mary. The latter's middle name is spelled "Catharine" instead of "Catherine." A photograph of Whitehurst's headstone can be viewed at *Dr Daniel W. Whitehurst*, FIND-A-GRAVE, at https://www.findagrave.com/memorial/87186706/daniel-w_-whitehurst. For many years, Whitehurst, like many early Key Westers, did not have a headstone. See Mike Capuzzo, *United in Death on Key West: Graves Shared*, MIAMI HERALD, June 9, 1981, at 1A, 4A.

⁵ HENRY S. MARKS, WHO WAS WHO IN FLORIDA 261 (1973). Marks incorrectly gives the date of the 1867 Fort Jefferson yellow fever outbreak as "1866." As has been explained elsewhere:

B. McMURTIE'S ARTICLE

There likewise is a brief description of Whitehurst in the *Florida Historical Quarterly*. In an article about early Florida newspapers, Douglas C. McMurtie explains that Whitehurst "established the *St. Augustine News* in November, 1838[,] published [it] until the end of 1840[,] and remained as editor through part of the next year, when he left Florida for New York."⁶

In the *News*' first issue, Whitehurst penned a long editorial in which he laid out his goals:

A paper, bearing the title of "THE NEWS," is this day issued, and seeks from the countenance of the public, such support as its merits may deserve. In thus adding another newspaper to the many which are already on occupied ground, the Editor candidly admits he feels the extent of the responsibilities, which necessarily attach to a faithful discharge of the duties incurred, and enters upon the field with no little solicitude, as to the success of an undertaking, in which more able and experienced hands have not unfrequently met with failure and defeat. . . .

Three years have now passed by, and the territory is still the theatre of war. Her people have ever shown a ready zeal to encounter any danger, which the exigencies of the times have demanded; and have repeatedly given proof in action of their fidelity and courage. Yet, with this amount of suffering and privation endured, her inhabitants have been misrepresented and abused, and error perpetuated, by *ex parte* statements, which have had their full influence aboard. To correct these impressions, and exonerate our people from the sweeping charges of anonymous or avowed authors; to disseminate such intelligence as will best develop the capabilities of our soil, and advance the agricultural interests of the country;—to support a system of education, which shall embrace every free white citizen of the country,—and to allay the discordancies of party, by a mild and equitable course of conduct, will be his anxious and studious effort. . . .

The dreaded yellow fever invaded Fort Jefferson in August, 1867. It was brought by Captain George W. Crabbe from Havana, Cuba. Unknowingly, he had carried on his person or in [his] luggage several Tiger mosquitoes that quickly multiplied into millions of virus carriers.

By late September the epidemic reached its peak. Of the approximately 400 people then at the fort, 275 were seriously infected. Of these, 38 had died, including two prisoners, the Post Surgeon, and four hospital nurses. Dr. Samuel Mudd had been fighting the scourge since September 6 when he was released from confinement. Dr. Daniel Whitehurst joined Mudd on September 7 when the latter returned from Key West. Both doctors performed heroic work and survived. They were credited with containing that particular epidemic which ended with the last case reported.

Living at Fort Jefferson Then and Now, DRY TORTUGAS NATIONAL PARK AND FORT JEFFERSON FERRY SERVICE, at <https://www.drytortugas.com/fort-jefferson-life/>.

⁶ Douglas C. McMurtie, *The Beginnings of Printing in Florida*, 23 FLA. HIST. Q. 63, 72 (1944).

The Editor disclaims all attachment to party, other than the cause of CORRECT PRINCIPLES, the TRUTH, and MORALS.

His columns are open, therefore, to all temperate communications, which do not entrench on private character, or which would strike at conscientious obligation.

These are the landmarks which shall guide him in the conduct of this paper.⁷

Whitehurst quickly abandoned the neutrality promised in his editorial. Like most East Floridians, he was a supporter of the Whigs,⁸ and when the party succeeded in electing William Henry Harrison president in 1840, Whitehurst joined other Whig newspaper editors at a celebratory dinner in Washington, D.C. When his turn came to speak, Whitehurst praised his fellow editors as “[t]he sentinels on the watch-tower of freedom—the conductors of the Whig press: Neither bound in ‘golden shackles’ nor intimidated by the ‘iron hand of despotism.’”⁹

In operating the *News*, Whitehurst showed a distinct taste for yellow journalism:

Established in 1838 by Peter Sken Smith and Daniel W. Whitehurst to promote Whig party principles, the *News* was generally more a purveyor of sensationalism than its arch rival, the St. Augustine *Florida Herald*. Most articles and editorials were written by Whitehurst, who had served in the Indian war as a staff officer for Brigadier General Joseph M. Hernandez, a commander of the East Florida militia. Thus, his interest in and knowledge of military affairs came naturally. Whitehurst depended on the ship captains who entered St. Augustine harbor enroute to and from southern military posts like Fort Lauderdale for much of his information about the war.¹⁰

⁷ D.W. Whitehurst, *The News*, ST. AUGUSTINE NEWS, Nov. 3, 1838, at 2 (capitalization and italics as in the original).

⁸ For a history of the Whig party in Florida, see HERBERT J. DOHERTY, JR., *THE WHIGS OF FLORIDA 1845-1854* (1959).

⁹ *Festival of Whig Editors*, NILES’ NAT’L REG. (Balt.), Mar. 20, 1841, at 34, 36.

¹⁰ Cooper Kirk, *Ambush on the New River*, 1 BROWARD LEGACY 8 (July 1977). As Kirk reports, Whitehurst’s partner in the *News* was Peter Sken Smith. The scion of a wealthy family, Smith, like Whitehurst, was a lawyer:

[Smith] was educated at Hamilton College and became a merchant before he had reached his 21st birthday. He established a large store in Utica . . . [but] soon became [overextended] and failed for upwards of \$100,000 and took the benefit of the bankruptcy act. He then entered [various New York] law office[s] . . . as [a] student . . . until he was admitted to practice. . . . In 1829 he removed to Oswego, and afterwards resided in Pennsylvania and Florida, where he was an officer in the U.S. Army, bearing the title of Major-General. For several years he was a prominent politician in Philadelphia, but his eventful life was ended May 6, 1858, in an insane asylum at Springfield, Mass.

On January 15, 1841, Whitehurst sold the *News* to Aaron Jones, Jr., and Thomas T. Russell.¹¹ In announcing the sale, Whitehurst made it clear he was staying on as editor:

The Subscriber has this day sold the Press, types, debts, &c, of "THE NEWS," to Messrs. THOMAS T. RUSSELL and AARON JONES, Jr., who will continue to issue it in [the] future as the proprietors thereof. The connection of the Subscriber for the present, will continue to exist as Editor.¹²

On March 5, 1841, however, Whitehurst resigned as editor. He subsequently bid the paper's readers good-bye by writing:

The Subscriber's connection with "THE NEWS," was dissolved on the 5th inst. In withdrawing his association from a Press, which he controlled over two years under much difficulty and opposition, he has reason to congratulate himself, that the strenuous efforts of personal and political enemies toward its destruction, were alike fruitless, and have left him unscathed from the combinations of undisguised malignancy. To his friends, he owes much for their forbearance and cordial assistance—to his opponents, nothing. With his brethren who have interchanged a friendly relation, he extends the warm hand of attachment—all that he can offer; and to those who have stood by him in "good and evil report," the assurances of his gratitude.¹³

¹¹ This turned out to be the first in a series of changes for the paper:

Whitehurst was succeeded on the *News* by Thomas T. Russell and Aaron Jones, Jr. Russell, a southerner by birth, published the *News* until the spring of 1845, when he left St. Augustine for Jacksonville, where he published for a short time the *Florida Whig*, a party organ which existed solely for political purposes. Jones came to the *News* from the Jacksonville *East Florida Advocate*, but he remained with the St. Augustine paper only a few months. From 1842 to 1844 Russell had as a partner Charles E. O'Sullivan, previously a compositor on the *Savannah Republican* of Georgia. After his two years in Florida, O'Sullivan returned to Savannah, where he was printing as late as 1869. When Russell left the *News* in 1845 he was followed by Albert A. Nunes, a foreign-born printer who was brought to the United States in 1819 at the age of two. He came to Florida about 1838, and his career after 1845 is not known. The *News* was moved to Jacksonville in 1846.

McMurtie, *supra* note 6, at 73.

¹² D.W. Whitehurst, *To the Public*, ST. AUGUSTINE NEWS, Feb. 5, 1841, at 3 (capitalization as in the original).

¹³ D.W. Whitehurst, *To the Public*, ST. AUGUSTINE NEWS, Apr. 2, 1841, at 2. Whitehurst's principal nemesis while running the *News* was James M. Gould, the publisher of the crosstown *Florida Herald and Southern Democrat*. Matters became so heated between the two men that at one point Whitehurst published a nearly page-long editorial attacking the *Herald*. See D.W. Whitehurst, *The Herald and Its Editors*, ST. AUGUSTINE NEWS, July 3, 1840, at 2. For a brief biography of Gould, see *History of St. Johns County*

C. SMILEY'S ESSAY AND WICKMAN'S BOOK

With a bit more effort, a researcher can go beyond Whitehurst's WWF entry and McMurtie's article and find what until now has served as Whitehurst's biography: an essay by Nora K. Smiley in *Martello*, the former annual journal of the Key West Art and Historical Society.¹⁴ It lists Whitehurst's full date of birth (September 29, 1807); his birth city (Norfolk); his full date of death (January 19, 1872); his wife's maiden name (Henrietta Weedon); and explains (somewhat incorrectly) that the couple had a son (Dr. Mason Whitehurst) and two daughters (whose names are omitted).

In addition to mentioning his war record, newspaper editorship, and medical studies, Smiley reports: "As a young man [Whitehurst] was active in the American Colonization Society ["ACS"]. It was in connection with this group that he made a trip to Liberia [c. 1831 to 1835], a considerable adventure in those days."¹⁵

Sheriffs, ST. JOHNS COUNTY SHERIFF'S OFFICE, at <https://www.sjso.org/sheriffs-office/history/>. As this source explains, Gould "was . . . brash and outspokenly belligerent toward his enemies. [After his newspaper days, he] had a busy life as public office holder [and served as] Sheriff, County Commissioner, Justice of the Peace, State Legislator, and Registrar of Public Lands." For a further look at Whitehurst and Gould's rivalry, see Jonathan B. Crider, "Printing Politics: The Emergence of Political Parties in Florida, 1821-1861" (unpublished Ph.D. thesis, Temple University, May 2017), available at <https://digital.library.temple.edu/digital/api/collection/p245801coll10/id/427023/download>.

¹⁴ See Nora K. Smiley, *Dr. Daniel W. Whitehurst*, 4 MARTELLO 21 (1967) [hereinafter MARTELLO]. Smiley's essay also appears in newspaper form. See Nora K. Smiley, *Dr. Daniel W. Whitehurst*, KEY WEST CITIZEN, Feb. 19, 1967, at 5B.

¹⁵ MARTELLO, *supra* note 14, at 21. Founded in 1816, the ACS promoted the transportation of freeborn U.S. Blacks and emancipated slaves to Africa. See ERIC BURIN, SLAVERY AND THE PECULIAR SOLUTION: A HISTORY OF THE AMERICAN COLONIZATION SOCIETY (2005). Upon returning to the United States, Whitehurst wrote a lengthy article about his trip, which was serialized by the ACS in its monthly magazine. See D.W. Whitehurst, *Mr. Whitehurst's Journal*, 12 AFR. REPOSITORY & COLONIAL J. 105-11, 144-50, 177-84, 209-16, 241-46, 273-81, and 307-15 (1836).

The exact dates of Whitehurst's trip are unknown. In his article, Whitehurst gives no inkling of when it began, but does say that on May 14, 1835, while in Monrovia (Liberia's capital), he and his fellow commissioners were "informed that our Mission being completed, our services were no longer required for the public benefit." See *id.* at 315. It appears that Whitehurst remained in Liberia until the fall, when he booked passage back to the United States. See [*News*] *From Western Africa*, COMM. ADVERT. (NY), Dec. 8, 1835, at 1 ("[T]he brig Ruth[] arrived yesterday at Philadelphia, after a passage of 43 days from Liberia. She brought the following passengers: . . . Daniel W. Whitehurst, Esq. . . ."). Based on various documents discussed later in this article, it seems likely that the trip started in late 1831. But see PATRICIA RILES WICKMAN, OSCEOLA'S LEGACY 206 (rev. ed. 2006) (listing "mid-1832" as Whitehurst's embarkation date—Wickman, however, gets several other facts wrong: not only does she say that Whitehurst took the trip for his health, she claims he went on it *after* he attended NYU).

Whitehurst's trip generated considerable interest outside ACS circles, with one newspaper reporting:

Messrs. D.W. Whitehurst, A.D. Williams, and G.R. McGill were appointed commissioners to proceed into the interior for the purpose of negotiating peace among the hostile tribes, and of exploring the country with a view

Smiley also adds that Whitehurst represented Key West at Florida's 1865 state constitutional convention.¹⁶

For the most part, however, Smiley focuses on two other events in Whitehurst's life. First, in 1843, Whitehurst received as a wedding present from his new father-in-law, Dr. Frederick R. Weedon, the head of the Indian warrior Osceola. Weedon had treated Osceola during the latter's confinement at Fort Moultrie in South Carolina and, following Osceola's death there in 1838, had taken his head as a trophy. Whitehurst, in turn, presented the relic to Dr. Valentine Mott, one of his NYU professors.¹⁷

to fixing on a spot for a colonial settlement in the interior. It appears . . . that they were not entirely successful. They took with them some Arabic Bibles for distribution,--a quantity having been received from the British and Foreign Bible Society.

Liberia, VT. CHRON. (Windsor), July 16, 1835, at 115.

¹⁶ Whitehurst was elected to this position by a comfortable margin, polling 54.5% of the vote. See *Political Items*, NEW ENG. FARMER (Boston), Oct. 28, 1865, at 3 ("The New York *Tribune* has a few returns from Florida of the election for delegates to the Constitutional Convention. In Monroe County, D.W. Whitehurst, 'representing the set who ruled *before* the war,' received 189 votes; Judge T.J. Boynton, 'representing the set who ruled *during* the war,' 150 votes; and Samuel Walker, 8 votes. Whitehurst's majority over all, 31.").

The convention met in Tallahassee for two weeks (Oct. 25-Nov. 7, 1865), with Whitehurst serving on the Boundaries Committee (which defined with increased precision the state's borders) and the General Provisions Committee, which dealt with "all subjects connected with the Colored Population of the State." See JOURNAL OF PROCEEDINGS OF THE CONVENTION OF FLORIDA, 1865, at 26 (1865) (listing Whitehurst's committee assignments).

Although grudgingly acknowledging that slavery had been destroyed by the federal government, in all other respects the delegates took pains to preserve the *status quo*. When they were finished, each man affixed his signature to the new constitution, with Whitehurst, the gathering's only doctor, adding "M.D." after his name. See *Constitution of the State of Florida, 1865*, FLORIDA MEMORY: STATE LIBRARY AND ARCHIVES OF FLORIDA, at <https://www.floridamemory.com/items/show/189093?id=47> (reproduction of page 47 of the original text showing Whitehurst's signature).

¹⁷ As has been explained elsewhere:

[I]n 1843, [Whitehurst] sent [the head] to Dr. Valentine Mott in New York, along with this short note: "My Dear Sir: Accompanying this, you will be handed the head of the celebrated Seminole Chief, Osceola, a man who in recent years filled a large space in the eye of the American public, if indeed not the civilized world. The strong sentiment which is manifested in the fate of the aborigines of this country and the policy of the government in consolidating them westward . . . is the removal of the Red Man."

When Dr. Mott received the package, he replied happily, "I am delayed returning you my thanks for the Head of Osceola. . . . It will be deposited in the collection and preserved in my library at home, for I fear almost to place it in my museum at the University . . . temptation will be so strong for someone to take it."

Andy McKee (posted by Art Remillard), *Empire, Science, and the Disembodied Head of Chief Osceola*, RELIGION IN AMERICAN HISTORY BLOG, June 3, 2014, at <http://usreligion.com>.

In describing Weedon—who she repeatedly misidentifies as “Weeden”¹⁸—Smiley mentions that he “had served as a colonel in General Andrew Jackson’s army . . . and . . . had settled in St. Augustine before Whitehurst.”¹⁹ Patricia Riles Wickman, in her much later book focusing on Weedon’s theft of Osceola’s head, describes how Weedon and Whitehurst likely became acquainted:

While Minorcan and Spanish inhabitants and American settlers banded together to form militia companies for physical protection, they also met compatriots in fraternal organizations. Frederick Weedon was a Freemason. Among the members of his lodge in little St. Augustine was a *criollo* (local-born Spaniard), Joseph M. Hernández, who was also the brigadier general commanding forces east of the St. Johns River. By at least mid-1837, Daniel Winchester Whitehurst, another Freemason, also was residing in St. Augustine. Whitehurst, originally of Norfolk, Virginia, was thirty years old that July when he became a lieutenant of a company of East Florida Mounted Volunteers in Col. John Warren’s regiment. Whitehurst spent his six-month enlistment (13 July 1837 to 4 February 1838) at duty stations at Picolata and along the St. Johns River, close enough to St. Augustine to enhance his association with the Weedon family. . . .

blogspot.com/2014/06/empire-science-and-disembodied-head-of.html. That Whitehurst gave Osceola’s head to Mott is unsurprising:

The outstanding figure of the faculty of the medical department of New York University was Valentine Mott (1785-1865), the first professor appointed. Mott was the most famous surgeon of his day in America. His early training was obtained at London and Edinburgh, after which he was elected professor of surgery at Columbia College at the age of twenty-six. When the medical faculty of Columbia College joined that of the College of Physicians and Surgeons, Mott was made professor. He continued there until 1826, when he resigned, together with several prominent associates, to found Rutgers Medical College.

CLAUDE EDWIN HEATON, A HISTORICAL SKETCH [OF] NEW YORK UNIVERSITY COLLEGE OF MEDICINE, 1841-1941, at 4-5 (1941).

There is a dispute over what eventually happened to Osceola’s head. In 1955, one of Weedon’s great-granddaughters said it was lost in an 1866 fire. See May McNeer Ward, *The Disappearance of the Head of Osceola*, 33 FLA. HIST. Q. 193, 201 (1955). In 2015, however, Seminole medicine man Bobby Henry insisted that the head was destroyed to cover up the U.S. Army’s murder of Osceola. See Peter B. Gallagher, *Bobby Henry’s Story: U.S. Soldier Murdered Osceola*, SEMINOLE TRIB., Sept. 2, 2015, at <https://seminoletribune.org/bobby-henrys-story-u-s-soldier-murdered-osceola/>. Henry’s claim runs counter to all other sources, who agree that Osceola died from “quinsy” (*i.e.*, a peritonsillar abscess). See, *e.g.*, THOM HATCH, OSCEOLA AND THE GREAT SEMINOLE WAR: A STRUGGLE FOR JUSTICE AND FREEDOM 236 (2012).

¹⁸ Smiley gets Weedon confused with his younger brother William, who, following a dispute over an inheritance, changed his last name to “Weeden.” See WICKMAN, *supra* note 15, at 201.

¹⁹ MARTELLO, *supra* note 14, at 21.

The records do not show when and where Whitehurst and Weedon met, but their overlapping spheres of interest in such a small town, and relative social stations must have thrown them together quickly.²⁰

After leaving the army in February 1838,²¹ Whitehurst in short order became a lawyer,²² started the *News*, and began pursuing various commercial

²⁰ WICKMAN, *supra* note 15, at 206. As Freemasons, Whitehurst and Weedon belonged to St. John's Lodge No. 12. According to one source: "St. Johns Lodge No. 12 was chartered [by the Grand Lodge of] Florida [but] surrendered its charter [sometime] before 1869. The Lodge lost all [its] property and records in a fire." See *History of Freemasonry in St. Augustine, Florida*, ASHLAR LODGE 98, at https://www.ashlarlodge98.org/uploads/8/6/5/9/86594636/the_history_of_freemasonry_in_st_augustine.pdf.

An 1840 notice invited the public to celebrate the "Festival of St. John" with the Lodge and advised that the event would include "an Oration . . . by Brother D.W. Whitehurst." The notice was signed by the "Committee of Arrangements," whose members included "F. Weedon." See *Celebration of St. John the Evangelist*, ST. AUGUSTINE NEWS, Dec. 18, 1840, at 3. In 1842, the Lodge held a service for the troops killed in the Second Seminole War, with Whitehurst reading an ode for the dead:

The burial of Major F.L. Dade's martyr'd dead and those officers and soldiers who have died in Florida, took place in St. Augustine on the 15th ult. The scene was a sad and solemn one. . . . The Masonic fraternity proceeded from the tombs to the Presbyterian Church, where a monody on the dead was pronounced by D.W. Whitehurst, Esq.

Honor the Dead, DAILY PICAYUNE (New Orleans), Sept. 2, 1842, at 2. (This service took place between Whitehurst's first and second years of medical school, when presumably he was home on vacation.)

²¹ While Wickman in her book uses Whitehurst's initial rank (lieutenant), Whitehurst's WWVF entry uses his final rank (major). The army's own records, however, use his intermediate rank (captain). See 10 FLORIDA MILITIA MUSTER ROLLS—SEMINOLE INDIAN WARS 103-04 (1968) ("Muster Roll of Captain D.W. Whitehurst's Company of Mounted Volunteers"). According to this source, Whitehurst's command consisted of one lieutenant, two sergeants, two corporals, and forty-two privates. In addition, it had two "servants" (*i.e.*, slaves), assigned, respectively, to Whitehurst and his executive officer (Lieutenant Joseph Woodruff).

²² Whitehurst announced his admission to the bar via a newspaper advertisement: "The Subscriber will attend to the duties of his profession in the various Courts of Law of this Territory. D.W. Whitehurst, Attorney at Law. St. Augustine. May 18, 1838." *Law Notice*, FLA. HERALD & S. DEM., July 21, 1838, at 4. During this period, becoming a lawyer in Florida was quite easy:

In 1832, the legislative council directed the court of appeals to draft rules for the superior courts. Under the new rules, an applicant had to be at least 21 years old and of good moral character. In addition, a superior court judge had to find the petitioner fit to practice.

Christopher A. Vallandingham, *Territorial Courts, in FLORIDA'S OTHER COURTS: UNCONVENTIONAL JUSTICE IN THE SUNSHINE STATE* 63 (Robert M. Jarvis ed., 2018) (footnotes omitted). Although it is not known which judge certified Whitehurst, it almost certainly was Eastern District Superior Court Judge Robert R. Reid, whose chambers were in St. Augustine. See THE AMERICAN ALMANAC AND REPOSITORY OF USEFUL KNOWLEDGE FOR THE YEAR 1842, at 313 (1841) (explaining that Reid served on the

ventures.²³ But as Wickman says, throughout this time Whitehurst was giving serious thought to becoming a doctor,²⁴ and in 1841, after selling the *News*, he enrolled in NYU's medical school (no doubt using at least some of the sale's proceeds to pay his tuition).²⁵

The decision to go to NYU was an easy one. In 1841, Florida had no medical schools.²⁶ Thus, to get his degree Whitehurst had no choice but to look outside the territory. More importantly, NYU's fledgling medical school ("University Medical College") was making no secret of the fact that it was willing to accept just about anybody.²⁷

As noted in his WWWF entry, Whitehurst received his degree in 1843.²⁸ As soon as he did, he rushed back to St. Augustine "to be married, on [30] April of that

court from 1832 until 1839, when he was named Florida's fourth territorial governor).

Even after he became a doctor, Whitehurst retained an interest in legal matters and continued to associate with lawyers. Shortly before his own death, for example, he helped plan the memorial service that the Key West bar held for U.S. District Judge John McKinney. See *In Memoriam*, YORK DAILY (PA), Nov. 8, 1871, at 3 ("Upon motion and unanimous consent, . . . D.W. Whitehurst, G.D. Allen, and B.K. Kerr [were directed] to make arrangements for a public meeting on Thursday, the 19th inst., at 12 o'clock m, at the U.S. Court Rooms.").

²³ In December 1838, for example, Whitehurst placed an ad offering to sell "Ninety acres of LAND, excellent quality, and well Timbered, on North River. Also, a small LOT, with dwelling, and out buildings, in this city." See *For Sale*, ST. AUGUSTINE NEWS, Dec. 1, 1838, at 3 (capitalization as in the original). A short time later, he was made a director, and elected secretary, of a local railroad. See *St. Augustine and Picolata Rail Road Company*, ST. AUGUSTINE NEWS, Mar. 30, 1839, at 4.

²⁴ Wickman believes that Whitehurst began considering a medical career after meeting Weedon. She also credits the influence of Dr. Benjamin B. Strobel, who helped Weedon decapitate Osceola's body at Fort Moultrie. In later years, Weedon and Strobel would get together whenever Strobel was in St. Augustine, and during these visits Whitehurst often joined them. See WICKMAN, *supra* note 15, at 171.

²⁵ See CATALOGUE OF THE OFFICERS, ALUMNI, AND STUDENTS OF THE UNIVERSITY OF THE CITY OF NEW-YORK: 1841-'42, at 10 (1842) (listing "Whitehurst, D.W., Florida" as one of the school's medical students).

²⁶ Florida's first medical school, located at the University of Miami, did not open until the Fall of 1952. See *University of Miami Makes Start on Medical School*, TAMPA DAILY TIMES, Apr. 2, 1952, at 6. See also *Overman v. State Board of Control*, 62 So. 2d 696, 701 (Fla. 1952) (en banc) (observing, in a decision permitting the University of Miami to use state funds to help pay for its new venture, "Florida is the largest state in the Union without a Medical School. It is the only state in the South without one.").

²⁷ See DAVID OSHINSKY, BELLEVUE: THREE CENTURIES OF MEDICINE AND MAYHEM AT AMERICA'S MOST STORIED HOSPITAL 5 (2016) ("The enormous [inaugural] entering class of 271 included almost everyone who applied. Only blacks, women, and complete illiterates were rejected. . . . Tuition was \$105 per term, plus a \$5 'matriculation' fee, a \$10 'broken' fee (for damaged equipment), and a \$20 'anatomical' fee (for fresh cadavers). With four terms required to graduate, plus a \$30 'graduation' fee, the total for each student ran to \$550, a hefty sum."). Two days before the start of classes, the faculty invited the "profession and friends of science generally" to attend the first week of lectures for free. See *University of New York—Department of Medicine*, N.Y. EVENING POST, Oct. 23, 1841, at 1. It is not known if anyone took the school up on its offer.

²⁸ This was a significant achievement, for 76% of Whitehurst's classmates ended up either dropping out or being dismissed. See *University of New York—Medical Department*, BUFFALO DAILY GAZETTE, Aug. 24, 1843, at 2 (reporting that only 65 students from the inaugural class managed to graduate). See also CATALOGUE OF THE GRADUATES AND OFFICERS OF THE MEDICAL DEPARTMENT OF THE UNIVERSITY OF THE CITY OF NEW YORK 34 (1872) (listing Whitehurst among the 1843 graduates).

year, to Henrietta Weedon, the eldest surviving daughter of his friend Frederick.”²⁹ At 35, Whitehurst was considerably older than Henrietta, who was 22 and considered “a dark-haired beauty.”³⁰

Shortly after the wedding, the couple moved to Dade County, where Whitehurst was named a justice of the peace.³¹ Whitehurst’s decision to relocate from St. Augustine to South Florida raises a host of questions, especially given that neither he nor Henrietta had ever visited the region (as far as I can tell); the couple had no friends or relatives in the area (ditto); and it was during this period that the pair began to have children. The most obvious explanation is that Whitehurst, angry at how he had been treated while at the *News*, wanted to get away from St. Augustine and make a fresh start somewhere else.³²

In 1845, the couple moved again, this time to Key West. After years of dithering, the federal government finally was going ahead with its plan to build a

²⁹ WICKMAN, *supra* note 15, at 209. Wickman inexplicably gets the date of the marriage wrong, listing it as “13 April” instead of 30 April. *Id.* The county’s official records, however, make it clear that the marriage took place on April 30. See *Daniel W. Whitehurst[.] Florida Marriages, 1830-1993*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/1:1:23C6-FCC> (this web page provides a link to the county clerk’s registration book, which shows that Whitehurst and Henrietta were issued a marriage license on April 29, 1843, and were married the next day).

Wickman correctly states that “[t]he couple [was] married by Father [Benedict] Madeore according to the rites of the Roman Catholic Church, and the civil notation was copied by Mr. [Peter B.] Dumas, county court clerk, on 12 May 1843.” See WICKMAN, *supra* note 15, at 334 n.32. At the time of the wedding, Madeore was newly arrived in St. Augustine. See *Church History, Basilica of the Immaculate Conception*, at <https://www.icjax.org/about-the-church.html>. In 1847, he began a campaign to obtain compensation from the federal government for its 1821 confiscation of local church lands. Although Madeore managed to convince Congress to arbitrate the dispute, the arbitrator (future U.S. Senator Stephen R. Mallory) ruled in favor of the government. For the case’s documents, including Mallory’s lengthy award, see *Report of the Solicitor of the Treasury, January 30, 1849*, 30th Cong., 2d Sess. (1849).

³⁰ SAMUEL CARTER III, *THE RIDDLE OF DR. MUDD* 312 (1974).

³¹ See *A JOURNAL OF THE PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE TERRITORY OF FLORIDA, AT ITS TWENTY-SECOND SESSION, 1844*, at 54 (1844) (indicating that Whitehurst received his commission on September 13, 1843). Whitehurst owed his new position to Governor Richard K. Call, a Democrat who in the 1840 presidential election had crossed party lines to support the Whig ticket. See 1 HARRY GARDNER CUTLER, *HISTORY OF FLORIDA: PAST AND PRESENT, HISTORICAL AND BIOGRAPHICAL* 119-20 (1923).

³² Whitehurst did not cut all his ties to St. Augustine. In 1852, for example, while on his way to Baltimore, he stopped for a visit:

We learn by letter from Key West that the Whigs of that city have appointed Dr. D.W. WHITEHURST as a Delegate to represent them in the Baltimore Convention. Other appointments would have been made for South Florida, had there been time to communicate with the other portions of the District. Dr. WHITEHURST took his departure in the last steamer from Key West, intending to make a brief visit to his former abode, St. Augustine, previous to his attendance at Baltimore.

Delegate from South Florida, FLA. REPUBLICAN (Jacksonville), May 27, 1852, at 2 (capitalization as in the original).

series of massive forts in the Florida Straits. First up was Fort Zachary Taylor in Key West,³³ where, as his WWF entry explains, Whitehurst was given the job of base physician. Undoubtedly, Whitehurst's military service gave him a leg up for the position and made the prospect of serving at a fort appealing.

Two years later, work began on Fort Thomas Jefferson at Garden Key in the Dry Tortugas, 68 miles to the west of Key West.³⁴ Having proven his mettle at Fort Taylor, Whitehurst, as his WWF entry further reports, now became Fort Jefferson's physician. Whitehurst also was appointed the installation's bookkeeper at a combined salary of \$150 per month.³⁵

In 1860, however, Whitehurst's Confederate sympathies cost him these jobs.³⁶ Whitehurst's change of status also meant that he could not remain at Garden Key. Thus, the family returned to Key West.³⁷ Once back in the city, Whitehurst became the captain of a band of local citizens called the "Island Guard," which looked for ways to drum up support for the rebels' cause. In a story in the *Charleston Daily Courier*, for example, readers learned about a Guard event that had served as a counterweight to a similar Union event:

³³ For the fort's history, see Ames W. Williams, *Stronghold of the Straits: Fort Zachary Taylor*, 14 TEQUESTA 3 (1954). See also EDWARD L. ENGLAND, *THE FORT ZACH GUIDEBOOK* (2017).

³⁴ For the fort's history, see Albert Manucy, *The Gibraltar of the Gulf of Mexico*, 21 FLA. HIST. Q. 303 (1943). See also THOMAS REID, *AMERICA'S FORTRESS: A HISTORY OF FORT JEFFERSON, DRY TORTUGAS, FLORIDA* (2006).

³⁵ See Williams, *supra* note 33, at 14. Over time, Whitehurst gained other government positions. An 1853 newspaper story, for example, reported: "The Secretary of the Navy has appointed D.W. Whitehurst Naval Storekeeper and Superintendent of the Coal Depot at Key West." See *Death of the Wife of Senator Douglas—Naval Appointment*, DAILY FREE PRESS (Burlington, VT), Jan. 21, 1853, at 2.

During his service at Garden Key, Whitehurst developed an interest in the island's fauna and flora and sent many of his finds to friends and colleagues. See, e.g., THEODORE LYMAN, *ILLUSTRATED CATALOGUE OF THE MUSEUM OF COMPARATIVE ZOOLOGY, AT HARVARD COLLEGE—NO. I, OPHIURIDAE AND ASTROPHYTIDAE V* (1865) ("I take this opportunity to thank the following gentlemen for their kind assistance in giving me specimens, and a great variety of valuable information: . . . Dr. Whitehurst, Surgeon of the post . . . at Fort Jefferson, Tortugas. . .").

³⁶ See HAL HIGDON, *THE UNION VS. DR. MUDD* 180 (expanded ed. 2008). Whitehurst was replaced as base physician by Dr. Joseph B. Holder. In 1892, Holder's widow Emily published an anonymous account of their lives at the fort. See *At the Dry Tortugas During the War: A Lady's Journal*, 1 CALIFORNIAN 87 (1892).

³⁷ See OFFICE OF THE SECRETARY OF THE INTERIOR, *THE EIGHTH CENSUS OF THE UNITED STATES: 1860* (1864) (Page 51, Lines 21-27 of Schedule 1.—Free Inhabitants in the City of Key West, in the County of Monroe, State of Florida, enumerated Aug. 14, 1860) [hereinafter KEY WEST—1860 U.S. CENSUS] (showing Whitehurst, Henrietta, their four children, and Dr. Hamilton M. Weedon, Henrietta's younger brother, living together in the city).

Hamilton Weedon was born in 1834 and graduated from Albany Medical College in 1855. After completing an internship at Albany Hospital, he moved to Key West, where he opened a private practice and also worked for the U.S. Marine Hospital Service. During the Civil War, he was placed in charge of the Confederate hospitals in Eufaula, Alabama, where he spent the remainder of his life. See *In Memoriam—Hamilton M. Weedon, M.D.*, 30 ALB. MED. ANNALS: J. ALUMNI ASS'N ALB. MED. COLLEGE 216 (1909).

In military circles we observe no important changes at this port [Key West,] except the increase of the [federal] garrison [at Fort Taylor] from a skeleton to a full Company. Captain Brannan, in command of Fort Taylor, fired a national salute on the 22d [George Washington's birthday, considered a sacred day by both the Union and the Confederacy]. The Island Guard, a volunteer Company in command of Capt. D.W. Whitehurst, also celebrated the day by an oration, speeches, &c.³⁸

The second event discussed at length by Smiley is Whitehurst's battle to control Fort Jefferson's 1867 yellow fever outbreak. Whitehurst had been summoned from his home in Key West on September 7th after Dr. John S. Smith, the fort's physician, died.³⁹ Upon reaching the fort, Whitehurst found Dr. Samuel A. Mudd, one of the prisoners, caring for the sick.⁴⁰

Mudd had been imprisoned at the fort following his conviction for aiding in the assassination of President Abraham Lincoln.⁴¹ Because of Mudd's untiring efforts during the outbreak,⁴² many of Mudd's patients, as well as Whitehurst himself, sent

³⁸ "Scarlet," *Correspondence of the Courier—Key West, February 26th, 1861*, CHARLESTON DAILY COURIER (SC), Mar. 7, 1861, at 1. In an obvious reference to Whitehurst, a later observer wrote: "They [the Confederates] felt a confidence and security that the prey was at any time within their grasp—Tortugas seemed beyond escape, and at Key West was an armed band called the Island Guard, its captain the clerk at Fort Taylor, and an old rat at the Government crib[.]" Delavan Bloodgood, *Fortis Taylor and Jefferson—How They were Saved*, in *THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS—SUPPLEMENT—FIRST VOLUME* 23, 24 (Frank Moore ed., 1866).

³⁹ Smith's tenure at Fort Jefferson had lasted less than two months, for he arrived on the island just prior to the start of the outbreak. See *Army Personal*, 4 ARMY & NAVY J. 747 (July 13, 1867) ("Brevet Major J.S. Smith, Assistant Surgeon, has been relieved from duty in the Department of Washington, and ordered to duty at Fort Jefferson, Tortugas, Florida.").

⁴⁰ Every biography of Mudd discusses his efforts to control the outbreak. For a work focusing solely on this part of his life, see ROBERT SUMMERS, *GET THE DOCTOR FROM HIS CELL: DR. SAMUEL A. MUDD, YELLOW FEVER, AND REDEMPTION AT AN ISLAND PRISON* (2015). Mudd's heroism forms part of the plot of the romance novel *Wave of Destiny*. Although Whitehurst is mentioned, he appears in just one sentence: "Dr. Whitehurst and Dr. Burbury issued pleas for volunteer assistance." MARTHA MELAHN, *WAVE OF DESTINY* 290 (1981). As Melahn explains in her Author's Note, *id.* at v, she invented Dr. Burbury to help drive her story.

Although all sources agree that Whitehurst went to Fort Jefferson on September 7th, they differ as to how long he stayed. Some sources say he remained until October 1st, when he was relieved by Dr. Edward Thomas, a "contract physician" from New York. See, e.g., ROBERT K. SUMMERS, *DR. SAMUEL A. MUDD AT FORT JEFFERSON* 88 (4th ed. 2009). In his book, however, Carter claims that Whitehurst, "with some relief," left the fort on September 25th. See CARTER, *supra* note 30, at 318 (agreeing that Whitehurst departed after Dr. Thomas arrived).

⁴¹ See *The Assassins at the Dry Tortugas*, N.Y. TIMES, Aug. 4, 1865, at 1.

⁴² At the height of the outbreak, one newspaper advised its readers:

We learn that out of four hundred prisoners at Dry Tortugas one hundred are sick with yellow fever. The commanding officer of the post and the surgeon of the hospital are also sick with the same disease.
Dr. Henry [sic] Clay [sic] Mudd, sentenced to imprisonment there for an

numerous letters to federal officials asking that Mudd be released.

In a letter to Major George P. Andrews, dated February 24, 1868, for example, Whitehurst wrote:

I regret to inform you, that I have no copy of my letter addressed [to] you in September or October last, in relation to the meritorious conduct of Dr. Mudd, during the epidemic of yellow fever at Fort Jefferson, last summer. I have subsequently to that letter to you, in a report to the Surgeon General, entered into much detail regarding those valuable services to me as the medical officer in charge, and to the sick, from his unwearied and constant devotion night and day in the wards.

Major Stone, and Lieuts' Orr + Gordon each spoke to me, in unqualified terms of admiration, of his excellent conduct; and their design to represent it to the government, in the hope that its clemency and justice, would be exercised to his benefit. These gentlemen all fell, victims to the fever, and when I wrote you, I thought it but just to their memories, that their feelings and views on this subject should be made a matter of record.

The services of Dr. Mudd, eminently valuable as they were, derive an additional value, from the fact, that he volunteered them, at a time when the sick were without direction, by the illness of Surgeon Smith, whose attendant he was.⁴³

D. FAMILY PAPERS

With still more effort, a researcher likely will come across the Weedon and Whitehurst Family Papers at the University of North Carolina (“WWFP”).⁴⁴ Although the bulk of this collection concerns the Weedons, it includes, for example, Whitehurst’s Sierra Leone “permission to enter” pass. Dated May 8, 1832, the pass identifies

alleged connection with the conspiracy to assassinate the late President Lincoln, is rendering medical assistance to those who are stricken with yellow fever at Dry Tortugas, and among his patients are the officers mentioned.

It is said that Dr. Mudd treats his patients with eminent success, and that most of them are in a fair way of recovery.

Yellow Fever at the Dry Tortugas, CHARLESTON MERCURY (SC), Sept. 28, 1867, at 2. As is obvious, the *Mercury*’s editors confused Dr. Mudd with his relative John Henry Clay Mudd. See 1 RICHARD D. MUDD, *THE MUDD FAMILY OF THE UNITED STATES* 474 (1951) (explaining that John, a Washington, D.C. lawyer, was born in 1821 and died in 1866).

⁴³ *Today’s Document*, NATIONAL ARCHIVES, Feb. 24, 2020, at <https://todaysdocument.tumblr.com/post/191000044354/letter-from-d-w-whitehurst-md-to-major-g-p>. On February 8, 1869, President Andrew Johnson granted Mudd a full pardon. For the pardon’s text, which describes Mudd’s role in containing the outbreak, see https://en.wikisource.org/wiki/Dr._Mudd%27s_Pardon.

⁴⁴ See *Collection 04057-z: Weedon and Whitehurst Family Papers, 1824-1869; 1932-1966?*, UNIVERSITY OF NORTH CAROLINA—SOUTHERN HISTORICAL COLLECTION, at <https://finding-aids.lib.unc.edu/04057/>.

Whitehurst by his full name; lists his birthplace as Norfolk, Virginia; and indicates that he is 24 years old.⁴⁵ It also provides the only known physical description of Whitehurst, reporting that he is 5'6" tall, has a pale complexion, brown hair, grey eyes, an aquiline nose, and an "as usual" mouth.⁴⁶

In response to the question, "Purpose for which Alien came into the Colony[?]," the pass states: "[F]or the benefit of his health."⁴⁷ As Wickman explains: "After a shipwreck and an escape from hostile natives, [Whitehurst] found refuge in Sierra Leone and recuperated there for more than three years."⁴⁸

As previously discussed, in 1831 Whitehurst agreed to go to Liberia to conduct a fact-finding mission for the ACS. That he would have appeared haggard to the authorities in Sierra Leone (Liberia's northern neighbor) after nearly losing his life twice is quite believable.⁴⁹ Whitehurst's own later reporting confirms that he remained in Sierra Leone until 1834.⁵⁰

Another document in the WWFP collection is Whitehurst's September 29, 1865, Amnesty Oath.⁵¹ As explained above, Whitehurst was forced to leave Garden

⁴⁵ This notation is the best evidence that we have that Whitehurst was born on September 29, 1807, and not, as is so often reported, September 29, 1808 (which would have made him 23 at the time the pass was issued).

⁴⁶ See *Weedon and Whitehurst Family Papers*, *supra* note 44, at <https://dc.lib.unc.edu/utills/ajaxhelper/?CISOROOT=04ddd&CISOPTR=196472&action=2&DMSCALE=29.359953024075&DMWIDTH=3406&DMHEIGHT=2757> (Sierra Leone Pass).

⁴⁷ *Id.*

⁴⁸ WICKMAN, *supra* note 15, at 206.

⁴⁹ I have found no independent proof that corroborates Wickman's claim that Whitehurst was the victim of a shipwreck and a native attack. Given the frequency of shipwrecks in the 19th century, however, and the pass's reference to Whitehurst's health, her claims ring true.

⁵⁰ Whitehurst's lengthy ACS article begins with him traveling on November 19, 1834 to visit "the tribes north of [Liberia's Saint Paul River] and there effect[], if possible, an amicable settlement of the difficulties existing among them[.]" See *Mr. Whitehurst's Journal*, *supra* note 15, at 105. This makes it clear that Whitehurst's expected 1832 arrival in Liberia was delayed by his long recuperation in Sierra Leone.

⁵¹ Whitehurst's oath was witnessed by George D. Allen, the clerk of the U.S. District Court for the Southern District of Florida. Even in a city with more than its fair share of eccentrics, Allen stood out:

Mr. George D. Allen was short, with a large head, usually surmounted by a silk hat, worn tipped back. He was full of energy, with a finger in everything that was going, or at least, comments to make on them. He had been a druggist, clerk of the United States court, merchant, United States marshal, member of the school board that instituted the first public or "free" school, tax collector and warden of St. Paul's church. His speech[,] while voluble, was accompanied by a kind of hesitating pause in the middle of his sentences and accentuated by a peculiar motion of the lower jaw, as if chewing, from which he acquired the nickname "Gum Drops." . . . He was a man of great and varied information, good ideas as to every one's business but his own; he was always trotting up and down the streets at something; was always most decidedly in evidence. He had an old saddle horse, with a peculiar gallop, whose rythmical hoof beats suggested the name of the drugs Mr. Allen usually prescribed for all ailments, which caused the old plug to be nicknamed Calomel-Jalap. . . .

Key in 1860 because of his pro-South leanings. In 1863, he was ordered to leave Key West for the same reason, but the order was rescinded at the last minute.⁵² In his Amnesty Oath, Whitehurst promised to resume being loyal to the United States.

Like many other well-to-do Southerners, Whitehurst was a slave owner:

Beginning in 1845 at the Key West fort [Fort Taylor] and in 1847 at Fort Jefferson on Garden Key [in the Tortugas], rented slaves worked ten-hour days in subtropical heat. Harsh conditions and open waters inspired dreams of escape. The first summer, seven slaves . . . disabled nearly all the vessels at the wharf and sailed away. Doctor Daniel Whitehurst organized a pursuit, but another posse caught the slaves. . . .

Doctor Whitehurst's slaves were considered the best workers at Fort Jefferson until the army ruled that as an officer in federal employ, he could not be paid for their labor. To skirt this ruling, he acquired many slaves in his wife's name. . . .

[T]he Whitehursts [later] added Weedon family slaves to their own. Over the years they bought twelve-year-old Sam, ten-year-old Lucy, and seven-year-old Sarah for \$500, then Charly, who was thirteen, and Mary, about four, for \$550. Contracts granted the slaves to Henrietta Whitehurst and her heirs "for their own proper use and benefit, for ever." The couple later acquired seven more slaves, including an eighteen-month-old girl, and the rights to "the future issue and increase of the females."⁵³

JEFFERSON B. BROWNE, *KEY WEST: THE OLD AND THE NEW* 177 (1912).

⁵² See Lewis G. Schmidt, *Civil War Days in Key West (Part 5)*, 9 FLA. KEYS SEA HERITAGE J. 8, 11-12 (Summer 1999). As Schmidt explains, the order was issued on February 25, 1863, by Colonel Joseph S. Morgan and rescinded two days later by Colonel Tilghman H. Good (Morgan's successor as Fort Taylor's commander). Had the order been carried out, Whitehurst, together with the rest of his family and other rebel sympathizers, would have been transported aboard the U.S.S. *Illinois* to Hilton Head, South Carolina.

⁵³ MIKE PRIDE, *STORM OVER KEY WEST: THE CIVIL WAR AND THE CALL OF FREEDOM* 18-19 (2020). For additional details regarding Whitehurst's role in the island's 1847 manhunt, see Mark A. Smith, *Engineering Slavery: The U.S. Army Corps of Engineers and Slavery at Key West*, 86 FLA. HIST. Q. 498, 508 (2008).

In addition to leasing out slaves, Whitehurst profited from slavery in other ways. In the spring of 1860, for example, the U.S. Navy freed 1,432 Africans from the American barques *Wildfire* and *William* (the two ships were intercepted off the coast of Cuba). Until the rescuees could be repatriated to their homelands, the Navy arranged for them to be housed in a hastily erected "depot" in Key West. During their stay, Whitehurst provided them with medical care, for which he was paid handsomely:

The expenses incurred by Mr. [Fernando J.] Moreno [the Southern District's U.S. Marshal] in maintaining the depot for eighty days came to \$19.14 per capita. The total cost was \$45,760. The expenditure for medicines and medical care was \$27,650.92, \$3,562 of which went to Drs. Whitehurst, [T.C.] Skrine and [Hamilton M.] Weedon [Henrietta's younger brother] for services rendered.

The merging of the Weedon and Whitehurst slaves occurred in 1853, when Whitehurst's father-in-law Frederick Weedon moved to Garden Key. In exchange for Whitehurst and Henrietta's written promise to care for him for the rest of his life, Frederick turned his slaves over to them.⁵⁴

In the 1860 federal census, Whitehurst's real property is valued at \$3,160,⁵⁵ while his personal property is valued at \$15,550.⁵⁶ Nearly all (\$15,000) of the latter amount represents Whitehurst's slaves; the rest likely reflects his law books and medical equipment.⁵⁷ The total (\$18,710) is the modern-day equivalent of \$547,003.20.⁵⁸

General Robert E. Lee's surrender at Appomattox (Apr. 9, 1865) therefore dealt Whitehurst a double blow. Not only did it extinguish the political cause he had so zealously championed (and for which he had sacrificed his government salary), it meant his slaves were free.⁵⁹ Thus, in the blink of an eye, Whitehurst lost 80% of his wealth.⁶⁰

E. NICHOLS'S REPORT

With much more work, a truly determined researcher will find, in the files of the St. Augustine Historical Society, a typed 10-page report by Robert E. Nichols,

A. W. Diddle, *Medical Events in the History of Key West*, 31 J. FLA. MED. ASS'N 207, 209 (1944).

⁵⁴ See *Weedon and Whitehurst Family Papers*, *supra* note 44 (under "Scope and Content") (explaining that the collection "include[s] bills of sale or exchanges of slaves in 1848, 1853-1857, 1860 and 1861. The bills of sale or exchange, 1853-1857, stem from a transaction, 1853, between Frederick Weedon and Henrietta W. Whitehurst whereby, in exchange for slaves, Weedon received care and a guaranteed annuity for the remainder of his life . . ."). Good to their word, Whitehurst and Henrietta took care of Frederick until he died in 1857. See *id.* (under "Biographical Information") ("[Frederick] lived the last years of his life with his daughter Henrietta and her husband; he died at Fort Jefferson in 1857.").

⁵⁵ See KEY WEST—1860 U.S. CENSUS, *supra* note 37, at line 21.

⁵⁶ See *id.*

⁵⁷ The 1860 federal census does not separately break out the value of Whitehurst's slaves. But when its figures are compared to those in the 1870 federal census, see *infra* note 60, and adjusted for inflation, there is no doubt that Whitehurst's slaves were worth \$15,000 in 1860.

⁵⁸ See S. Morgan Friedman, *The Inflation Calculator*, at <https://westegg.com/inflation/>.

⁵⁹ As a legal proposition, of course, they had been free since January 1, 1863 (the date set by President Lincoln's 1862 Emancipation Proclamation). But now, they also were free as an actual matter, although it would take another six weeks for this fact to be fully absorbed. See Robert L. Hall, "Yonder Come Day": *Religious Dimensions of the Transition from Slavery to Freedom in Florida*, 65 FLA. HIST. Q. 411, 420 (1987) (explaining that on May 20, 1865, Union General Edward M. McCook gathered the residents of Tallahassee and formally declared the Proclamation in effect in Florida).

⁶⁰ Whitehurst's finances never recovered. In the 1870 federal census, taken just 18 months before his death, Whitehurst is listed as having \$3,400 in real property and just \$600 in personal property. See OFFICE OF THE SECRETARY OF THE INTERIOR, THE NINTH CENSUS OF THE UNITED STATES: 1870 (1872) [hereinafter KEY WEST—1870 U.S. CENSUS] (Page 78, Line 24 of Schedule 1.—Inhabitants in Key West, in the County of Monroe, State of Florida, enumerated July 5, 1870).

an amateur historian, called *Who Was Eliza C. Whitehurst?*⁶¹ Although it devotes most of its attention to Whitehurst's mother Eliza, it offers additional details about Whitehurst.

As Nichols explains, Eliza was born in Georgetown, South Carolina,⁶² most likely in 1779.⁶³ Her parents were Elizabeth and Daniel Roland (spelled "Rolain" or "Rowland" in some sources). On October 6, 1807, Eliza married a man named James Whitehurst in Norfolk, Virginia.⁶⁴ James, whose birth year is unknown, originally was from Princess Anne County (present-day Virginia Beach).⁶⁵

⁶¹ The report [hereinafter Nichols Report] is attached to a letter, dated Oct. 13, 1998, from Nichols to Charles Tingley, the Society's librarian. Neither the letter nor the report is included in the Society's on-line catalogs (<https://sahs.pastperfectonline.com/>), and a researcher must know to ask for them. They were located for me by Chad Germany, the Society's assistant librarian.

⁶² "Georgetown" can refer to Georgetown County (founded 1800); Georgetown District (founded 1769); or the City of Georgetown (founded 1729). See PAUL T. HELLMANN, HISTORICAL GAZETTEER OF THE UNITED STATES 974 (2005). In this article, the name is used to refer to the entire area without further specificity.

⁶³ Nichols claims that Eliza was born in 1786, which would be (based on Nichols's own research) two years *after* the death of her father Daniel. See Nichols Report, *supra* note 61, at 2. This obviously is not possible. Nichols arrives at his conclusion by taking Eliza's supposed age at death (52) and working backwards from when she died (June 3, 1838). However, as he admits, "Her 1838 grave marker in the Huguenot Cemetery in St. Augustine provides her age as 5_, the last digit having eroded to the point where it can no longer be read." The more likely 1779 date comes from Volume 48 (1894) of the *New England Historical and Genealogical Register*, which Nichols cites in footnote 2 of his report. See Nichols Report, *supra* note 61, at 10.

⁶⁴ For this date, Nichols relies on 2 ELIZABETH B. WINGO, MARRIAGES OF NORFOLK COUNTY, VA., 1788, 1793-1817, at 117 (1963). Wingo, in turn, relies on the "Minister's Return" filed by the Reverend Thomas T. Jones, who performed the ceremony. The foregoing, of course, means, as Nichols explains, that Whitehurst was born a bastard:

On September 3, 1807 in Norfolk Co., VA, James WHITEHURST obtained a license to marry Eliza C. ROWLAND which ceremony was performed by Rev. Thomas T. JONES on October 6, 1807 in Norfolk. It is important to note the date that James WHITEHURST obtained his license to marry Eliza, nearly five weeks prior to the event itself, because he apparently did so as much from necessity as from desire. According to census records, James and Eliza had a son before 1810 and this son, from all available evidence, was the future Dr. Daniel W. WHITEHURST of St. Augustine, Key West, and Tortugas who was born in Norfolk, VA on September 29, 1807, twenty-six days after the license but seven days before the marriage ceremony!

Nichols Report, *supra* note 61, at 2 (capitalization as in the original).

Under Virginia law, James and Eliza's marriage legitimated Whitehurst. See 1785 Virginia Acts ch. 60, § 17, reprinted in 12 HENING'S STATUTES AT LARGE 139-40 (1823). See also *Stevenson's Heirs v. Sullivant*, 18 U.S. (5 Wheat.) 207, 257-58 (1820) (describing Virginia's legitimation law). As such, Whitehurst was able to avoid the stigmatization historically suffered by children born out of wedlock. See generally JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY (1982).

⁶⁵ The Whitehurst family arrived in Virginia in 1636. A branch of the family later moved to North Carolina. The family's history is traced in DIANE WHITEHURST COLLINS, THE

Within just a few years of the marriage (neither Nichols nor I can pin down an exact date), James and Eliza moved to South Carolina. Although both the 1810 and 1820 city censuses show them in Charleston, Nichols explains that the couple lived in Georgetown (Eliza's hometown) from 1812 to 1816:

[M]any historical notes concerning South Carolina politics during and subsequent to the British Invasion of 1812 firmly place the family in nearby Georgetown Parish some 40 miles to the north of Charleston during the better part of the 1810-20 decade. Eliza's future expertise as a hostess and innkeeper during this decade are apparent in the 1812-16 journal of Gen. Peter Horry. It is repeatedly recorded that travelers of note to Georgetown often were guests of the family and were given food and lodging during their stay at the WHITEHURST home. According to his journal, Gen. Horry frequently corresponded with James WHITEHURST, and his own family and guests were welcomed on many occasions by "Mrs. WHITEHURST."⁶⁶

In 1816, James and Eliza moved back to Charleston to run a popular restaurant called the Carolina Coffee House.⁶⁷ As Nichols reports, in 1823 James died of unknown causes.⁶⁸

During their 16-year marriage, Eliza and James had four children: Daniel; a second son named James (1810?-Apr. 30, 1816); and two daughters.⁶⁹ The name

WHITEHURST FAMILY OF PRINCESS ANNE COUNTY, VIRGINIA AND PITT COUNTY, NORTH CAROLINA (2d ed. 2004). The enormous size of the Whitehurst clan makes it easy to attribute events to the wrong family member. During Whitehurst's life, for example, there was another "D.W. Whitehurst," who lived in Carteret County, North Carolina. *David W. Whitehurst* (1810?-66) was a farmer, merchant, and long-time member of the North Carolina House of Commons (the state legislature's lower chamber). For a look at this side of the Whitehurst family, see DAWN D.B. ECKHOUT, *THE WHITEHURST FAMILY OF CARTERET COUNTY, NORTH CAROLINA: OVER 390 DIRECT DESCENDANTS OF WILLIAM RICHARD WHITEHURST, WITH SOURCE NOTES* (2000).

⁶⁶ Nichols Report, *supra* note 61, at 3 (footnotes omitted) (capitalization as in the original).

⁶⁷ The Carolina Coffee House, modeled after the Carolina Coffee House in London's Birching Lane, was founded in 1785 by John Williams. In 1799, the business was taken over by Catherine Coates, who operated it until 1802. From then on,

the property . . . changed hands several times. In October 1816, James Whitehurst announced that he had leased the property and that "the Ball and Supper Rooms are handsomely painted and fitted up for parties." A year later Whitehurst repeated that "the *Ball Room* is commodiously and well fitted up for the convenience of Balls and Cotillion Parties."

NICHOLAS MICHAEL BUTLER, *VOTARIES OF APOLLO: THE ST. CECILIA SOCIETY AND THE PATRONAGE OF CONCERT MUSIC IN CHARLESTON, SOUTH CAROLINA, 1766-1820*, at 133-34, 145 (2007) (italics as in the original). See also JAMES W. HAGY, *CHARLESTON, SOUTH CAROLINA CITY DIRECTORIES FOR THE YEARS 1816, 1819, 1822, 1825, AND 1829*, at 67 (reprint ed. 2002) (listing, in the 1819 directory, James's address as being the Carolina Coffee House on Tradd Street).

⁶⁸ See Nichols Report, *supra* note 61, at 5.

⁶⁹ *Id.*

of the first daughter is unknown. Nichols speculates that she was born sometime between 1812 and 1816 and died prior to 1829. The second daughter was named Anna (1819?-June 29, 1855).⁷⁰

In 1822, Eliza's sister Margaret Cook moved to St. Augustine with her husband Samuel, a Charleston tailor she had married in 1810.⁷¹ Margaret and Samuel undoubtedly were lured to Florida by the fact that, after nearly 300 years as a Spanish colony, the territory now was in U.S. hands.⁷²

In describing this part of Whitehurst's life, Nichols writes:

[Whitehurst's] name first appears among the list of unclaimed letters at the St. Augustine Post Office on April 1, 1823. The young Daniel, not yet sixteen years of age, probably was living with his Uncle Samuel and Aunt Margaret COOK at the time the letter in his name was received at the Post Office. Although speculative, but because he was his father's only male heir, the letter very likely notified him of the death of his father.⁷³

Based on subsequent events discussed later in this article, it almost is a certainty that the letter went unclaimed because Whitehurst, having helped Margaret and Samuel move to St. Augustine, already was on his way back to South Carolina when the letter was sent. It also seems likely that the letter was mailed by Eliza, or someone acting on her behalf.

As Nichols explains, in 1826 Samuel died.⁷⁴ Over the next four years, Margaret turned one of their properties—the three-story Ximenez building on Hospital Street—into a boarding house.⁷⁵ In 1829, Eliza agreed to move to St. Augustine to help Margaret run the business.⁷⁶ Accompanying Eliza was Whitehurst's 10-year-

⁷⁰ Anna's second husband was the Reverend Rufus King Sewall, the pastor of St. Augustine's Presbyterian Church. As Nichols explains at page 6 of his report, in 1848 Sewall was "essentially . . . run out of town because of the controversy over a page in his book, *Sketches of St. Augustine*, on which a statement suggested that the city's strong Minorcan population were 'of servile extraction,' implying that their ancestors were black and/or slaves." (underlining as in the original) To escape the controversy, Sewall and Anna moved to Wiscasset, Maine, where, according to Nichols, Anna died "on June 29, 1855 at the age of only 36 . . . possibly from complications resulting from the birth of her sixth child. . . ." Nichols Report, *supra* note 61, at 6-7.

⁷¹ *See id.* at 4.

⁷² Spain's 1821 turnover of Florida to the United States attracted numerous settlers, and the sudden influx soon led to the taking of the territory's first official census. *See* Dorothy Dodd, *The Florida Census of 1825*, 22 FLA. HIST. Q. 34 (1943).

⁷³ Nichols Report, *supra* note 61, at 7 (capitalization as in the original).

⁷⁴ *Id.* at 4.

⁷⁵ Constructed in 1798 by Andres Ximenez, Margaret and Samuel had acquired a one-third interest in the building in 1825. Margaret purchased another one-third interest in 1827. By 1830, she owned the entire building. *See* Ximenez-Fatio House Museum, *Our Story*, at <https://www.ximenezfatiohouse.org/our-story> [hereinafter *XF House Our Story*]. In 1924, Hospital Street was renamed Aviles Street "because it sounded 'more charming.'" BETH ROGERO BOWEN, *ST. AUGUSTINE IN THE GILDED AGE* 88 (2008).

⁷⁶ In describing Eliza and Margaret's partnership, one source has written: "Realizing the economic importance of a boarding house in the struggling yet growing community, the sisters strove to entice clientele to the Hospital Street house with their hospitality and efficiency." KAREN G. HARVEY, *DARING DAUGHTERS: ST. AUGUSTINE'S FEISTY FEMALES*,

*A KEY WEST "JACK-OF-ALL-TRADES":
THE STRANGE LIFE, AND PECULIAR DEATH, OF DR. DANIEL W. WHITEHURST*

old sister Anna.⁷⁷ On April 13, 1837, Whitehurst, by now 29, scratched his name and the date into one of the building's windows. In 1939, the building was turned into a museum with Whitehurst's handiwork preserved for all to see.⁷⁸



Dr. Daniel W. Whitehurst's April 13, 1837 "scratched-in" window signature
Photograph (taken 2014) courtesy of the Ximenez-Fatio House Museum

There are three other interesting tidbits in Nichols's report. First, he gives the location of Whitehurst and Henrietta's wedding—St. Augustine's Cathedral Basilica⁷⁹—and points out that Henrietta was Catholic (Whitehurst likely was

1565-2000, at 71 (2002). Another source reports: "Up to twenty-four guests could be accommodated in the house, with rooms for single men located on the ground floor, while rooms for women and families were located upstairs." MARY ATWOOD & WILLIAMS WEEKS, *HISTORIC HOMES OF FLORIDA'S FIRST COAST* 106 (2014).

⁷⁷ See Nichols Report, *supra* note 61, at 6 ("Anna arrived in St. Augustine from Charleston with her mother in 1829. . . . Although Elizabeth BREBNER was more than twice her own age, Anna surely became close friends with her cousin and the two young women likely assisted their widowed mothers with chores associated with running Margaret COOK's boarding house on Hospital Street.") (capitalization as in the original).

⁷⁸ See *XF House Our Story*, *supra* note 75. See also E-mail from Stefanie Kite, Operations Manager, Ximenez-Fatio House Museum (St. Augustine), to the author, dated Feb. 13, 2023, at 2:33 p.m. (copy on file with the author) ("The window is on the second floor of the original house building and is located in the room we call the 'Owners Parlor.' The etching is on the interior of the pane on the south window facing east over Aviles Street."). As explained *supra* note 75, in Whitehurst's time Aviles Street was known as Hospital Street.

⁷⁹ Built over five years (1793 to 1797), the Basilica Cathedral has long been the seat of the Catholic Bishop of St. Augustine. In 1970, the structure was designated a national

Presbyterian).⁸⁰ Second, he notes that Whitehurst's senior thesis at NYU, "unlike those of his classmates, was not written about [a] medically technical area[;] rather, the subject of his thesis was 'Woman.'" ⁸¹ Third, he partially fills in a gap in Smiley's article by giving the names of Whitehurst's two daughters: Catherine and Laura.⁸²

In fact, Whitehurst had *five* children, as Wickman reports in her book (as will be seen, some of her other information is wrong):

Henrietta Williams Weedon (1821-1885) and Daniel Winchester Whitehurst (1808-1874) had five children: Clarence (died at sea, no issue); Mason (1853-1881, also a physician); Mary Katherine, or "Kate" (1858-1924); Laura (1860-1925); and Manning. Laura never married. Kate was married to a Spanish military officer, but the two never lived together as man and wife. The two sisters spent the rest of their lives together.⁸³

As is obvious, Wickman misreports Whitehurst's birth and death years. With respect to Henrietta, Wickman correctly lists her middle name and her birth and death years. Elsewhere in her book, she reports that Henrietta was born in Huntsville, Alabama, on January 25, 1821, and that the Weedons moved from Alabama to Tallahassee when she was six years old.⁸⁴ These facts line up with the 1870 federal census, which shows Henrietta being 49 years old, a native of Alabama, and "keeping house" for Whitehurst, Mason, Kate, Laura, and Manning.⁸⁵ Henrietta also appears in the 1880 federal census⁸⁶ and the 1885 Florida state census,⁸⁷ which was taken shortly before she died.⁸⁸

historic landmark, and in 1976 Pope Paul VI recognized it as a "minor basilica." See *Cathedral of St. Augustine*, NATIONAL PARK SERVICE—U.S. DEPARTMENT OF THE INTERIOR, at https://www.nps.gov/nr/travel/american_latino_heritage/Cathedral_of_St_Augustine.html.

⁸⁰ See Nichols Report, *supra* note 61, at 7.

⁸¹ *Id.* (citing UNIVERSITY OF NEW-YORK, MEDICAL DEPARTMENT ANNUAL ANNOUNCEMENT OF LECTURES 1843-1844, at 14-15 (1843)). Unfortunately, Whitehurst's paper no longer exists. See E-mail from Glenda S. Barahona, Reference Archivist, NYU Medical Archives, to the author, dated Feb. 17, 2021, at 5:49 p.m. (copy on file with the author).

⁸² See Nichols Report, *supra* note 61, at 8.

⁸³ WICKMAN, *supra* note 15, at 213.

⁸⁴ *Id.* at 201-02. As Wickman further explains, Henrietta's mother was Frederick Weedon's second wife Mary Wells Thompson, the daughter of a well-to-do Alabama planter. The couple married in 1816; moved to Tallahassee in 1827; and moved again in 1834, "almost two hundred miles across the Florida Territory," to St. Augustine. *Id.* at 202.

⁸⁵ See KEY WEST—1870 U.S. CENSUS, *supra* note 60, at Lines 24-29.

⁸⁶ See OFFICE OF THE SECRETARY OF THE INTERIOR, THE TENTH CENSUS OF THE UNITED STATES: 1880 (1883) [hereinafter KEY WEST—1880 U.S. CENSUS] (Page 26, Supervisor's District 18, Enumeration District 114, Line 9 of Schedule 1.—Inhabitants in Key West, in the County of Monroe, State of Florida, enumerated June 26, 1880).

⁸⁷ See Page 6, Enumeration District 5, Line 26 of Schedule 1.—Inhabitants in Key West, in the County of Monroe, State of Florida, enumerated June 26, 1885, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/3:1:S3HY-6XSZ-9C?i=211&personUrl=%2Fark%3A%2F61903%2F1%3A1%3AMNJC-BNQ>.

⁸⁸ No source gives the exact date of Henrietta's death. For a further look at Henrietta's life, see Alison R. Hardage, *Henrietta Williams Weedon, 1821-1885*, ANCESTRY.COM,

With respect to Whitehurst's children, the following corrections are in order:

Clarence. Clarence was Whitehurst's first child and appears in both the 1850 federal census (where he is listed as being seven years old)⁸⁹ and in the 1860 federal census (where he is listed as being 16 years old and still living with his parents).⁹⁰ Based on these entries, he was born in 1844.⁹¹ By 1862, Clarence was a student at the Maine Wesleyan Seminary in Kent's Hill, Maine.⁹² In the 1880 federal census, there is a "Clarence W. Whitehurst" (the "W." almost certainly an abbreviation for "Weedon") living in Live Oak County, Texas, and working as a "stock raiser" (*i.e.*, rancher).⁹³ That this *is* Clarence is supported by his race (White) and the fact that he gives his birthplace as "Florida"; his father's birthplace as "Virginia"; and his mother's birthplace as "Alabama."⁹⁴ Although Wickman says that Clarence perished at sea, this is incorrect. Instead, shortly after the 1880 census was taken he moved to New York City and died there on March 26, 1893, at the age of 49.⁹⁵ Although he was married at the time of his death, we do not know his wife's name or whether he had any children.⁹⁶ The only other thing we know about Clarence is that he apparently had some sort of disability as a child, for a stranger who met him when he was 12 remarked: "Mrs. Whitehurst has two boys under six—the eldest a little cripple—he was a pitiable object."⁹⁷

at https://www.ancestry.com/family-tree/person/tree/69316113/person/36277542865/story?_phsrc=KTc165&_phstart=successSource.

⁸⁹ See OFFICE OF THE SECRETARY OF THE INTERIOR, THE SEVENTH CENSUS OF THE UNITED STATES: 1850 (1853) (Line 14 of Schedule I.—Free Inhabitants in Tortugas, District No. 3, in the County of Monroe, State of Florida, enumerated Aug. 24, 1850).

⁹⁰ See KEY WEST—1860 U.S. CENSUS, *supra* note 37, at Line 23.

⁹¹ Although the 1850 federal census indicates that Clarence was born in 1843, this is almost impossible because: 1) Whitehurst and Henrietta did not get married until Apr. 30, 1843; and 2) Whitehurst was in New York City during the early part of 1843 finishing up his medical studies. The 1860 federal census corrects the mistake by lowering Clarence's age by one year.

⁹² See CATALOGUE OF THE OFFICERS AND STUDENTS OF THE MAINE WESLEYAN SEMINARY, AND FEMALE COLLEGE, KENT'S HILL, READFIELD, 1862-63, at 9 (1863) (identifying Clarence as one of the school's male students and listing his home as "Key West, Fla.").

⁹³ See OFFICE OF THE SECRETARY OF THE INTERIOR, THE TENTH CENSUS OF THE UNITED STATES: 1880 (1883) [hereinafter LIVE OAK—1880 U.S. CENSUS] (Page 5, Supervisor's District 6, Enumeration District 102, Line 30 of Schedule 1.—Inhabitants in Commissioner's Precinct No. 4, in the County of Live Oak, State of Texas, enumerated June 5, 1880).

⁹⁴ *Id.*

⁹⁵ See *Clarence [sic] Whitehurst: Death • New York, New York City Municipal Deaths, 1795-1949*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/1:1:2WVQ-NM1> [hereinafter CWW Death Certificate]. That this *is* Clarence is proven by the fact that his mother is listed as "Heneretta" (an obvious misspelling of Henrietta).

An 1883 directory lists Clarence, unmarried, living at 49 Morton Street in Manhattan's West Village and working as a clerk, although it does not give the name of his employer. See TROW'S NEW YORK CITY DIRECTORY, FOR THE YEAR ENDING MAY 1, 1883, at 1792 (1883).

⁹⁶ See CWW Death Certificate, *supra* note 95.

⁹⁷ Emma Talcott Norman, *Shipwreck and Escape in the Tortugas*, SOUTH FLORIDA

Mason. As Wickman reports, Mason (middle initial “J.”) was born in 1853 and followed in his father’s footsteps. After graduating from the University of Maryland’s medical school in 1875,⁹⁸ Mason returned to Key West and moved in with his mother and sisters.⁹⁹ On June 9, 1881, he married Irene Bethel,¹⁰⁰ but died soon thereafter of unknown cause.¹⁰¹ In 1884, James L. Harn, a Jacksonville lawyer, sued Mason’s estate to foreclose on his only asset: a single lot of land in Jacksonville.¹⁰²

COLLECTIONS MANAGEMENT CENTER, EVERGLADES NATIONAL PARK (n.d.), available at <http://www.themosttraveled.com/Shipwreck%20and%20Escape%20in%20the%20Dry%20Tortugas.pdf> (the quoted language appears at page 7 of the transcription).

Norman was a passenger aboard the steamer *Coronet*. During a July 1856 voyage from New Orleans to Liverpool, the ship foundered in the Florida Straits, forcing the passengers to take refuge on Garden Key. See *Memoranda—Disaster*, CHARLESTON DAILY COURIER (SC), Aug. 15, 1856, at 4. Norman’s belief that Clarence was less than half his actual age suggests that his disability, whatever it was, severely affected his physical development.

⁹⁸ See *The University of Maryland: Sixty-Eighth Commencement of the School of Medicine*, SUN (Balt.), Mar. 2, 1875, at 1 (listing Mason among the graduates). In 1878, Mason joined the Florida Medical Association. See PROCEEDINGS OF THE FLORIDA MEDICAL ASSOCIATION—SESSION OF 1878, at 5 (1878) (“The Committee on Credentials reported favorably on the credentials of Drs. Horstman, Whitehurst, Mitchell, Shine and Kimball.”).

⁹⁹ See KEY WEST—1880 U.S. CENSUS, *supra* note 86, at Lines 9-12 (showing Henrietta, Kate, Laura, and Mason all sharing the same house).

¹⁰⁰ See *Mason J Whitehurst[:] Florida, County Marriages, 1830-1957*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/1:1:QG1J-WLH6>. This web page provides a link to Monroe County’s marriage license index. Irene (1858-1939) subsequently married the famous Key West wrecker Bradish (Hog) Johnson. Her headstone mentions Johnson but says nothing about Mason. See *Irene Bethel Johnson*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/49558380/irene-johnson>. For a biography of Johnson, see Vincent Gilpin, *Bradish W. Johnson, Master Wrecker, 1846-1914*, 1 TEQUESTA 21 (1941).

¹⁰¹ I have not found any source that gives the exact date of Mason’s death. For a photograph of Mason’s headstone, see *Mason J. Whitehurst*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/142087022/mason-j.-whitehurst>. As this picture reveals, Mason’s headstone is next to the headstone of his maternal grandfather Frederick Weedon.

It is probable that Mason died of yellow fever. See *Yellow Fever at Key West*, N.Y. TIMES, Aug. 24, 1881, at 5 (reporting that the dreaded disease once again was present in the city). As a busy seaport with limited sanitation facilities, Key West repeatedly experienced yellow fever outbreaks during the 19th century. See Herbert L. Tindall, *Yellowjack and the Conchs: The Impact of Yellow Fever on Key West*, 2 FLA. KEYS SEA HERITAGE J. 1 (Spring 1992).

¹⁰² See *Dr Mason J Whitehurst in the Florida, U.S., Wills and Probate Records, 1810-1974*, ANCESTRY.COM, at <https://www.ancestry.com/discoveryui-content/view/632774:8993>. Harn represented a man named Thomas McMurray, who claimed he was owed “some Six or Seven Hundred Dollars which sum is secured by a mortgage upon the before mentioned lot.” *Id.* Recognizing that the lawsuit was sure to raise eyebrows given its tardiness, Harn wrote in his papers: “[This petition concerns] the Estate of the late Dr. Mason J. Whitehurst. We understand that he died some two years since and that no administration was ever taken out.” *Id.*

That Mason died intestate and nearly broke is not surprising. First, he had inherited nothing when his father died. (As previously explained, Whitehurst lost nearly all his

Mary. Mary was Whitehurst's middle child. As will be explained shortly, she ended up having the greatest impact on Whitehurst's life. For the moment, however, it suffices to say that she was born in 1857 (not 1858 as Wickman reports) and that the correct spelling of her middle name was "Catherine," and not, as Wickman indicates, "Katherine," nor as her headstone proclaims, "Catharine." This is made clear by her 1919 passport application, which includes her photograph.¹⁰³ Given the actual spelling of her middle name, Mary's use of the nickname "Kate" is puzzling. As Wickman partially reports, Mary died on March 5, 1924, in Tampa.¹⁰⁴

Laura. As Wickman states, Laura (middle initial "H.") was born in 1860. But contrary to her account, Laura was married. Her husband was an optometrist named Bernardo Gallo,¹⁰⁵ and the couple took their vows in Key West on April 2, 1902.¹⁰⁶ Later, they moved to Tampa, where they spent the rest of their lives. Bernardo died on December 9, 1924;¹⁰⁷ Laura passed away four months later (Apr. 7, 1925).¹⁰⁸ Laura's *Find-A-Grave* web page includes a photograph showing her and Bernardo's joint Key West headstone.¹⁰⁹ Wickman is correct that Kate lived with Laura, but she did so as part of Bernardo and Laura's household. This is made clear by

wealth at the end of the Civil War.) Second, he had been working as a doctor for only six years. Lastly, he had just gotten married and likely had spent whatever money he did have on his wedding and setting up his new home with Irene.

¹⁰³ See *Mary Catherine Whitehurst in the U.S., Passport Applications, 1795-1925*, ANCESTRY.COM, at https://search.ancestry.com/cgi-bin/sse.dll?indiv=1&dbid=1174&h=918175&tid=&pid=&queryId=b21476e59ae2a1e15aedc313f187dd10&usePUB=true&_phsrc=KTc35&_phstart=successSource. This web page provides a link to Mary's passport application.

¹⁰⁴ See *Mary C. Whitehurst[:] Florida Deaths, 1877-1939*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/1:1:FP9G-RYT>. This web page provides a link to Mary's death certificate, which shows that she was born on January 27, 1857.

¹⁰⁵ See *U.S., Passport Applications, 1795-1925 for Bernardo Gallo*, ANCESTRY.COM, at https://search.ancestry.com/cgi-bin/sse.dll?indiv=1&dbid=1174&h=542913&tid=&pid=&queryId=b816db86a2a3319ea53dd0676c19742f&usePUB=true&_phsrc=KTc167&_phstart=successSource. This web page provides a link to Bernardo's passport application.

In addition to stating his profession, Bernardo explains that he is applying for a passport "for myself and wife Laura"; that he was born in Cuba on August 20, 1860; that he immigrated to the United States in 1883; and that while living in Key West, he became a U.S. citizen in 1893. The application includes (on page 2) photographs of both Bernardo and Laura.

¹⁰⁶ See *Bernardo Gallo[:] Florida Marriages, 1837-1974*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/1:1:QG1J-MT3M>. This web page provides a link to Monroe County's marriage license index.

¹⁰⁷ See *GALLO*, TAMPA DAILY TIMES, Dec. 10, 1924, at 11A ("Nonardo [sic] Gallo, 68 [sic], died at this home in Tampa yesterday. He is survived by his widow, Mrs. Laura Gallo. . . The body will be sent to Key West for funeral and burial.").

¹⁰⁸ See *Laura Whitehurst Gallo[:] Florida Deaths, 1877-1939*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/1:1:FP74-KY2>. This web page provides a link to Laura's death certificate, which also gives her birth date (Mar. 28, 1860).

¹⁰⁹ See https://images.findagrave.com/photos/2015/31/142086543_1422826838.jpg (the inscription reads: "Bernardo Gallo 1860-1924; "Laura W. Gallo 1860-1925").

the 1910 federal census, which identifies Kate as Bernardo's widowed sister-in-law.¹¹⁰

Manning. Manning (middle initial "E.") was Whitehurst's youngest child. He is listed in the 1870 federal census as being nine years old,¹¹¹ which means he was born in 1861. In 1875, he is included on the roster of preparatory students at Mount Saint Mary's College in Emmitsburg, Maryland.¹¹² In the 1880 federal census, he is shown living in Jacksonville and working as a clerk in a dry goods store.¹¹³ A July 16, 1885, newspaper story reports that Manning traveled from Florida to Keyport, New Jersey, where he threatened to kill and eat a "Captain R.R. Sewell" for insulting a member of his family.¹¹⁴ After being arrested, Manning calmed down,

¹¹⁰ See DEPARTMENT OF COMMERCE AND LABOR—BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES: 1910 (1913) (Sheet B, Supervisor's District 1, Enumeration District 60, Lines 75-77, City of Tampa, County of Hillsborough, State of Florida, enumerated Apr. 16, 1910). In this census Kate is listed as being 50, meaning she shaved three years off her real age. Laura's age is listed as 45, meaning she shaved five years off her real age. Bernardo, on the other hand, gives his real age (49).

¹¹¹ See KEY WEST—1870 U.S. CENSUS, *supra* note 60, at Line 29.

¹¹² See CATALOGUE OF MOUNT SAINT MARY'S COLLEGE, EMMITSBURG [SIC], MD.—ACADEMIC YEAR 1875-'76, at 16 (1876) (listing "Whitehurst, Manning E." of "Key West, Fla." as being a high school sophomore). As its web site (<https://msmary.edu/>) explains, the school, which was founded in 1808, now is known as Mount Saint Mary's University.

Manning undoubtedly found his time in Emmitsburg bleak. As one pair of commentators has written:

Life at Mt. St. Mary's in those days [1875-78] had very few attractions, save for the studious. The social side of education seems to have been entirely neglected; and while there ever existed among the students a tender good-fellowship, yet they knew little of one another. There were few means of amusement, and these very restricted, while the notion obtained that "all work and no play" should be the collegians' constant watchword.

2 THE STORY OF THE MOUNTAIN: MOUNT ST. MARY'S COLLEGE AND SEMINARY 154 (John J. Tierney & Peter A. Coad eds., 1911).

¹¹³ See OFFICE OF THE SECRETARY OF THE INTERIOR, THE TENTH CENSUS OF THE UNITED STATES: 1880 (1883) (Page 4, Supervisor's District 18, Enumeration District 34, Line 39 of Schedule 1.—Inhabitants in Jacksonville, in the County of Duval, State of Florida, enumerated July 3, 1880). See also WEBB'S JACKSONVILLE DIRECTORY—1882, at 74 (1882) (listing Manning as still living in the city and still working as a clerk).

¹¹⁴ The story does not say who Sewell allegedly insulted and provides no additional information about Sewell. The 1885 New Jersey state census shows a Rufus R. Sewell, age 20-65, living in Keyport. See *Rufus R Sewell in the New Jersey, U.S., State Census, 1885*, ANCESTRY.COM, at https://search.ancestry.com/cgi-bin/sse.dll?indiv=1&dbid=61556&h=836688&tid=&pid=&queryId=7372f07f5de83cee3266cbd0790b5fff&usePUB=true&_phsrc=KTc87&_phstart=successSource.

Undoubtedly, however, Rufus's last name was "Sewall" and he was Manning's cousin Rufus Roland Sewall (1844-89), one of the children of Reverend Rufus Sewall and his wife Anna (Whitehurst's younger sister). See *supra* note 70. See also *Anna E Whitehurst Sewall*, FIND-A-GRAVE, at <https://www.findagrave.com/memorial/36411342/anna-e-sewall> (listing Rufus Roland as one of Anna's children and giving his birth and death dates).

retracted his charges, and eventually was released. According to the newspaper: "The affair was a most mysterious one to all onlookers. . . . One could not but feel that the man might not be sound in mind. His variability would seem to indicate that he was laboring under some infirmity."¹¹⁵ On October 30, 1886, Manning can be found among the inmates in a Huntsville, Texas prison—unfortunately, the prison register does not indicate the reason for his arrest.¹¹⁶ Despite diligent searching, the only further trace of Manning after this date are several 1892 newspaper articles that mention that a "Manning Whitehurst" is the president of the Topeka (Kansas) Bi-Chloride of Gold Club, an organization for recovering alcoholics.¹¹⁷ Whether this Manning Whitehurst is Whitehurst's son is impossible to say.

Mason, Mary, and Laura all died childless. If Clarence and Manning also died without children (which, from the available evidence, seems likely), Whitehurst's direct line has died out. As previously explained, however, his sister Anna had six children,¹¹⁸ so it is likely that Whitehurst has distant relatives who currently are alive.

III. ADDITIONS

Collectively, Whitehurst's WWF entry, McMurtie's article, Smiley's essay, Wickman's book, the WWFP collection, and Nichols's report would seem to provide a thorough recounting of Whitehurst's life. In fact, however, they all overlook four very important details.

¹¹⁵ *Armed with a Rawhide*, MONMOUTH INQUIRER (NJ), July 16, 1885, at 3.

¹¹⁶ *See Texas, U.S., Convict and Conduct Registers, 1875-1945 for M E Whitehurst*, ANCESTRY.COM, at https://search.ancestry.com/cgi-bin/sse.dll?indiv=1&dbid=2143&h=121961&tid=&pid=&queryId=46e07de46dd87235101fd9f081f3f145&usePUB=true&_phsrc=KTc21&_phstart=successSource (under "Registration No. 4161"). The register indicates that Manning lives in Paris, Texas; was arrested on October 22, 1886; was born in Florida; is 26 years old; is 5' 8" tall and weighs 118 pounds; has a fair complexion, black hair, and black eyes; and is a "Lawyer" (which almost certainly was not true). Just a few months earlier, Manning had been pardoned from a 12-month jail sentence by Alabama governor Edward A. O'Neal after it was discovered that he had tuberculosis. *See Several Pardons That Were Granted by the Governor Yesterday*, MONTGOMERY ADVERT. (AL), July 23, 1886, at 5.

¹¹⁷ *See, e.g., The Bi-Chloride Gold Club*, ST. J. (Topeka, KS), Jan. 14, 1892, at 4. Bi-Chloride of Gold was a quack cure for alcoholism that was very popular in the 1890s. Championed by Dr. Leslie E. Keeley, it was known as both the "Gold Cure" and the "Keeley Cure." For a further discussion, see, e.g., *Keeley Cure*, HISTORY NEBRASKA BLOG, at https://history.nebraska.gov/publications_section/keeley-cure/.

¹¹⁸ *See supra* note 70.

A. *EXPULSION FROM WEST POINT*

In the Fall of 1826, Whitehurst enrolled as a student at the United States Military Academy at West Point.¹¹⁹ He had tried to enroll in 1825, but there had been no slot for him.¹²⁰

¹¹⁹ See LIST OF CADETS ADMITTED INTO THE UNITED STATES MILITARY ACADEMY, WEST POINT, N.Y., FROM ITS ORIGIN TILL SEPTEMBER 1, 1901, at 103 (1902) (indicating that Daniel W. Whitehurst, of South Carolina, was admitted in 1826).

I have been unable to find any information about Whitehurst's pre-college education. It is likely, however, that he was reared in the Charleston public schools. In 1811, the South Carolina legislature had passed a law requiring each election district to have a free public school. While this edict was met with either indifference or outright hostility in most parts of the state, in Charleston it was taken seriously:

The free school system gained the most popularity in Charleston where it began. In 1812, the city had five schools. A glimpse of those schools comes from an 1887 account by Charleston School Superintendent Henry P. Archer: "No child under eight was admitted unless he or she had made some proficiency in reading. Students were taught 'reading, writing, arithmetic, spelling, parsing [study of sentence components and parts of speech], geology, grammar and the pence and multiplication tables. Special attention was paid to penmanship.'"

The History of South Carolina Schools, SOUTH CAROLINA CENTER FOR EDUCATOR RECRUITMENT, RETENTION, AND ADVANCEMENT (Virginia B. Bartels ed.), at https://www.carolana.com/SC/Education/History_of_South_Carolina_Schools_Virginia_B_Bartels.pdf. As previously explained, see *supra* text accompanying note 67, in 1816 Whitehurst's parents moved to Charleston to run the Carolina Coffee House. Whitehurst would have been nearly nine years old and therefore eligible to attend the city's schools.

¹²⁰ This is made clear by a letter that U.S. Representative William Drayton (D-Charleston) sent to Whitehurst on April 6, 1826:

I this morning received a letter from the Secretary of War [James Barbour] in reply to your application for admission at the Academy at West Point in which he says that he had directed the letter & recommendations in your favor to be put on file to be considered next year when the Selections will be made from the applicants to fill the vacancies which may occur in the interim at the Military Academy. Mr. [Abraham] C. Myers of Georgetown[, South Carolina] has been appointed for the present year [and, as a result,] no vacancy [currently] exists. . . .

1 THE JEWS OF THE UNITED STATES, 1790-1840: A DOCUMENTARY HISTORY 68 (Joseph L. Blau & Salo W. Baron eds., 1963). Drayton's letter to Whitehurst turns up in Blau and Baron's book because it is quoted in a missive that Abram Myers—a prominent Jewish merchant, politician, cantor, and Abraham's father—sent to Barbour. Despite being accepted ahead of Whitehurst, Abraham's admission to West Point was held up (due to anti-Semitism) until 1828, leading Abram to complain to Barbour. For a biography of Abraham, see BRUCE S. ALLARDICE, CONFEDERATE COLONELS: A BIOGRAPHICAL REGISTER 287 (2008) (explaining that Abraham, who finally graduated from West Point in 1833, served as the Confederacy's first quartermaster-general but resigned in 1863 after his wife Marion implied that President Jefferson Davis's wife Varina was a Native American, a frequent but inaccurate claim made on account of her olive complexion).

Following his first semester, Whitehurst was expelled for taking part in the "Eggnog Riot."¹²¹ Although the revolt began as an innocent Christmas party in the North Barracks, it quickly spiraled out of control. In all, 90 cadets (out of 260) were implicated and 20 were court-martialed, including future U.S. Supreme Court Justice John A. Campbell, future Mississippi Governor Benjamin G. Humphreys, and future Texas Secretary of State Samuel A. Roberts.¹²²

Unlike many of his fellow cadets, Whitehurst was largely blameless. Indeed, the most damning thing anyone could say about him was that he had gotten drunk.¹²³ The uprising, however, gave the school an excuse to clean house and it did not miss the opportunity:

[T]he academic board, [not to be confused with the Court of Inquiry, which was separately trying the court-martialed cadets,] having finished examining the cadets, made [its own] recommendations. . . . Jim Hamilton, for instance, had been cited by many as a central figure in the mutiny, but before his role in the disturbances could be adjudged . . . "the board . . . recommended that he be discharged." Hamilton packed his bags and left. . . .

¹²¹ See *U.S., Military and Naval Academies, Cadet Records and Applications, 1800-1908*, ANCESTRY.COM, at https://www.ancestry.com/imageviewer/collections/1299/images/40487_548227-00116?treeid=&personid=&hintid=&queryId=f83b5f51d898c3067a852a2f2d08f30&usePUB=true&_phsrc=KTc118&_phstart=successSource&usePUBJs=true&_ga=2.202856913.1730001549.1611737458-564600014.1608575374&_gac=1.57645400.1611478137.Cj0KCQiA0rSABhDIARIsAJtjfCcixJJIq-UAP9oX_Wb5MIaZz4_w7rCfhOzjMdabPMLXhkve1ksLN6waAuonEALw_wcB&pId=123934 (indicating that Whitehurst left West Point on January 29, 1827).

The immediate cause of the riot was Superintendent Sylvanus Thayer's order banning drinking by the corps of cadets. As has been explained elsewhere:

Before Thayer became superintendent in 1817, West Point hardly resembled the esteemed military academy of modern times. When it first opened its doors in 1802, it was nothing more than a few ramshackle buildings with ten cadets taught by three teachers. Students were admitted at any point during the year, and admissions standards were laughable. All this began to change after the War of 1812, when America's military failings inspired Congress to spend more money on the institution. They instated Thayer as superintendent, hoping he would bring order to the derelict academy.

Natasha Geiling, *Egg Nog: It's All Fun and Games Until Someone Starts a Holiday Riot*, SMITHSONIAN MAG., Dec. 19, 2013, at <https://www.smithsonianmag.com/arts-culture/egg-nog-its-all-fun-and-games-until-someone-starts-a-holiday-riot-180949281/>.

¹²² For a thorough recounting of the uprising, see JAMES B. AGNEW, *EGGNOG RIOT: THE CHRISTMAS MUTINY AT WEST POINT* (1979).

¹²³ In his January 12, 1827, appearance before the school's "Court of Inquiry," for example, Cadet Thomas Drayton testified: "I saw—after breakfast—on the 25th December last Cadet J.F. Davis [the future president of the Confederate States of America] in a state of intoxication and also Cadet Whitehurst, the latter in the Mess-Hall." 1 *THE PAPERS OF JEFFERSON DAVIS: 1808-1840*, at 78 (Haskell M. Monroe, Jr. & James T. McIntosh eds., rev. ed. 1991). Unlike Whitehurst, Davis escaped punishment and graduated in 1828. See Walter L. Fleming, *Jefferson Davis at West Point*, 10 PUBL. MISS. VALLEY HIST. SOC'Y 247 (1909).

The board also recommended that several other cadets be dismissed for lack of aptitude in certain academic disciplines or for bad conduct. Among them were Walter Otey, Charles Schoolfield, George Skipwith, Charles Whistler, and Daniel Whitehurst, all fourth classmen [*i.e.*, freshmen]. These and several cadets in the other classes departed for home not long after Hamilton.¹²⁴

It is not known what kind of reception Whitehurst received when he got home. It likely was not a very pleasant one.¹²⁵

B. ELECTION TO THE FLORIDA SENATE

On November 29, 1865, Whitehurst was elected to the Florida Senate. A total of 123 votes were cast, with Whitehurst receiving 119 votes; John J. Philbrick netting three votes; and an “H. Albury” garnering one vote.¹²⁶

¹²⁴ AGNEW, *supra* note 122, at 133-34.

¹²⁵ Whitehurst apparently did not go directly home, for Agnew reports that in subsequent proceedings before the Court of Inquiry, “Stocker, in his support of Berrien’s story, requested that the court send to New York to order the return of ex-cadet Whitehurst, who he said could confirm Stocker’s statement regarding the assault.” *Id.* at 149. (As Agnew explains, cadet John C. Stocker, Jr. was on trial for assaulting Captain Ethan A. Hitchcock during the riot. Stocker denied touching Hitchcock and identified cadet James W.M. Berrien as the culprit. Berrien willingly accepted responsibility and boasted about his actions to anyone who would listen.)

Whitehurst’s whereabouts between early 1827 (after he left West Point) and late 1831 (when he departed for Africa on his ACS trip) are uncertain. However, there is a tantalizing clue in the October 29, 1831, issue of the *Charleston Courier*:

The Subscriber begs leave to inform her friends and the public, that she has taken that large and commodious HOUSE on Bay-st. formerly occupied by Mr. Whitehurst, which has been fitted up and prepared to accommodate both constant borders and transient persons. Her table will always be plentifully equipped with the best that the Market affords, and every exertion used to render those comfortable who may favor her with their patronage.

This Hotel is in the immediate mercantile part of the town, and conveniently situated to all the public offices.

A share of public patronage is respectfully solicited.

ELIZA W. POTTER.

Georgetown, (S. C.) October 21 [O 22 s3]

New Hotel, CHARLESTON COURIER (SC), Oct. 29, 1831, at 3 (capitalization as in the original). Given Whitehurst’s familial connection to Georgetown, it seems reasonable to believe that the “Mr. Whitehurst” mentioned in this notice is Whitehurst; that he spent at least part of the period 1827 to 1831 in Georgetown; and that by the Fall of 1831 he no longer needed a place to live because he was setting sail for Africa.

¹²⁶ See *Weedon and Whitehurst Family Papers*, *supra* note 44, at <https://dc.lib.unc.edu/utills/ajaxhelper/?CISOROOT=04ddd&CISOPTR=462298&action=2&DMSCALE=31.298904538341&DMWIDTH=3195&DMHEIGHT=3996> and <https://dc.lib.unc.edu/utills/ajaxhelper/?CISOROOT=04ddd&CISOPTR=462282&action=2&DMSCALE=31.201248049922&DMWIDTH=3205&DMHEIGHT=3999> (certificate of election signed by Probate Judge Winer Bethel and electors John H. Mead and Henry Muhenan, dated Dec. 2, 1865).

Under Florida's 1865 constitution (which Whitehurst had helped write three weeks earlier as a member of the state's constitutional convention), senatorial terms were two years.¹²⁷ During his term, Whitehurst was one of three senators appointed to a special committee to study the advisability of establishing a State Medical Board. On November 22, 1866, the committee unanimously recommended that the board be created.¹²⁸

On the same day as the committee's recommendation, Whitehurst introduced a bill reconfiguring Dade County.¹²⁹ In 1823, when Monroe County was created out of St. Johns County (one of Florida's two original counties), all the Florida Keys (Upper, Middle, and Lower) were made part of it.¹³⁰ In 1836, however, when Dade County was carved out of Monroe County, the Upper and Middle Keys were included in its boundaries at the urging of the notorious Jacob Housman.¹³¹

Philbrick was a successful local businessman who in 1889 built Key West's first electric plant. See *Electricity Comes to the Keys*, KEYS WKLY., Aug. 10, 2018, at <https://keysweekly.com/42/electricity-comes-to-the-keys/>. Following his death in 1897, Philbrick's estate was sued by one of his creditors. The case made it all the way to the U.S. Supreme Court, which dismissed due to a lack of federal jurisdiction. See *Allen v. Arguimbau*, 198 U.S. 149 (1905).

Although I have not been able to determine with certainty the identity of "H. Albury," the reference likely is to Henry Albury, who soon after the election moved to Tampa, opened a saloon and a billiards parlor, and in 1868 became the sheriff of Hillsborough County. See CANTER BROWN, JR., *TAMPA IN CIVIL WAR AND RECONSTRUCTION* 93, 128 (2000).

¹²⁷ See 1865 Fla. Const. art. IV, § 5 ("The Senators shall be chosen by the qualified electors for the term of two years, at the same time, in the same manner, and at the same places where they vote for members of the House of Representatives; and no man shall be a Senator unless he be a white man, a citizen of the United States, and shall have been an inhabitant of this State two years next preceding his election, and the last year thereof a resident of the District or County for which he shall be chosen, and shall have attained the age of twenty-five years.").

¹²⁸ See JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF FLORIDA AT THE 2D SESSION OF THE FOURTEENTH GENERAL ASSEMBLY 41 (1866) [hereinafter 1866 FLORIDA SENATE PROCEEDINGS]. For a variety of reasons, no action was taken on the committee's recommendation and the subject was allowed to languish until 1889. See Ronald Hamowy, *The Early Development of Medical Licensing Laws in the United States, 1875-1900*, 3 J. LIBERTARIAN STUD. 73, 83 (1979) ("The first state to require both a diploma in medicine and examination was Florida. In 1889, the State Medical Society was successful in prevailing upon the state legislature to enact a medical practice law which authorized the appointment of medical examining boards for each judicial district to examine all candidates 'upon production of a medical diploma from a recognized college.'").

¹²⁹ See 1866 FLORIDA SENATE PROCEEDINGS, *supra* note 128, at 40.

¹³⁰ See An Act to Provide for the Organization of a County South of Charlotte Harbour in the Territory of Florida (approved July 3, 1823), in ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA PASSED AT THEIR SECOND SESSION 1823, at 122-24 (1823).

¹³¹ See Dorothy Dodd, *Jacob Housman of Indian Key*, 8 TEQUESTA 3, 9-10 (1948). For a map showing the 1836 division, see *Monroe County's Changing Border*, KEYS WKLY., July 20, 2018, at <https://keysweekly.com/42/monroe-countys-changing-border/>.

As Dodd reports, Housman (sometimes spelled "Houseman") was the most successful wrecking captain in the Upper Keys and the owner of nearly every square inch of Indian Key, a small island just a few hundred yards off the Atlantic Ocean side of present-day Islamorada. However, Monroe County's political establishment was

Whitehurst's bill corrected this anomaly by returning the Upper and Middle Keys to Monroe County.

I have found no contemporaneous newspaper stories discussing (or even mentioning) Whitehurst's bill.¹³² As a result, all we have is the bare legislative record, which reveals that the bill passed the Senate (unanimously and without debate) on November 24, 1866; passed the House of Representatives (also unanimously and without debate) on December 6, 1866; and was signed into law by Governor David S. Walker on December 8, 1866.¹³³

controlled by the wrecking captains in Key West. Thus, when Dade County was created in 1836, Housman successfully lobbied for the Upper and Middle Keys to be placed in it. Housman also convinced the Florida legislature to make Indian Key the county seat of Dade County. An 1840 Indian attack razed Indian Key, leading the county seat to be moved to Miami in 1844. Today, Indian Key is a state park. *See Indian Key Historic State Park*, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, at <https://www.floridastateparks.org/IndianKey>.

¹³² The earliest newspaper account I have located regarding Whitehurst's bill is from 1923:

The act of 1866 gave the northern boundaries of the county at the mouth of Broad creek, a stream separating Cayo Largo, now known as Key Largo, from Old Roads key, and extending thence in a direct line to Mud point. This change gave back to Monroe county all the islands from Old Roads key to Bahia Honda, which had been taken by the act of 1836.

Monroe Has Dwindled as Years Pass, TAMPA DAILY TIMES, June 4, 1923, at 1B.

¹³³ *See* ACTS AND RESOLUTIONS ADOPTED BY THE SECOND SESSION OF THE 14TH GENERAL ASSEMBLY OF THE STATE OF FLORIDA 62 (1867). In full, the law (officially designated "Chapter 1,592 [No. 57]"), read as follows:

AN ACT changing and defining the Boundary of Dade County.
SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Florida in General Assembly convened*, That the district of country [sic] included within the following boundaries shall hereafter constitute the County of Dade, to-wit : Commencing at the mouth of Broad Creek, (a stream separating Cayo Largo from Old Rhodes Key,) thence in a direct line to Mud Point, thence along the main land to Whites Bluff, thence in a straight line to the point where the Range line strikes the main land between Ranges thirty-six and thirty-seven, thence along the western margin of the Everglades, and Lake Okeechobee to the Township line between Townships thirty-seven and thirty-eight, thence East along said Township line to the Atlantic Ocean, thence along the Coast including the waters of the Atlantic Ocean and the Gulf Stream within the jurisdiction of the State of Florida, to the place of beginning.
SEC. 2. *Be it further enacted*, That so much of the former County of Dade as is not included within these boundaries is attached to and made a part of the County of Monroe, and the County Clerk of Monroe County is hereby authorized to transcribe so much of the Records of Monroe County as pertain to the County of Dade, and such records so transcribed shall be received in all courts of law and equity, and the expenses incurred in said transcribing of records shall be paid by the County of Dade.

Id.

C. ELECTION AS MAYOR OF KEY WEST

Upon his return from Tallahassee, Whitehurst was elected mayor of Key West and served from 1868 to 1869.¹³⁴ Remarkably, there is no record of Whitehurst's election or his activities while in office. In his 1912 book about Key West, however, Jefferson B. Browne includes a full list of the city's mayors and provides the following description of Whitehurst: "Dr. Daniel W. Whitehurst, both physician and attorney, was a quiet, cultured, lovable gentleman of the old school, a man of education, travel and experience."¹³⁵

D. DEATH

Whitehurst died at his home in Key West on January 19, 1872.¹³⁶ Because he was 64, it has been taken for granted that he died of old age.¹³⁷ And because his obituary has not survived,¹³⁸ there has been nothing to fact check.¹³⁹

However, in a paragraph near the end of his 1974 book about Dr. Mudd, Samuel Carter III states:

¹³⁴ See Tom Hambright, *Today in Keys History*, KEY WEST CITIZEN, Jan. 19, 2017, at A2.

¹³⁵ BROWNE, *supra* note 51, at 56, 182. In another part of his book, Browne explains *sub silentio* why Whitehurst did not stand for re-election: "The earliest contest after reconstruction, in which the newly enfranchised negroes voted, was the mayoralty election of 1869, when Hon. Joseph Beverly Browne, the Democratic candidate[,] defeated Mr. E.L. Ware, the candidate of the black Republican party, as it was then called." *Id.* at 130. In his book about Key West, Walter C. Maloney also includes a list of Key West's mayors, although he gets Whitehurst's name wrong, giving it as "Dr. W. Whitehurst." See WALTER C. MALONEY, A SKETCH OF THE HISTORY OF KEY WEST, FLORIDA 17 (1876).

¹³⁶ In his book on pre-statehood Florida newspapers, James Owen Knauss cites this date and explains that it "was obtained for me by one of my students, Miss Mary Weedon, from Miss Mary Whitehurst, Ybor City, Florida, a daughter of Daniel W. Whitehurst." JAMES OWEN KNAUSS, TERRITORIAL FLORIDA JOURNALISM 68 n.288 (1926). Thus, sources that use a different year (such as Wickman) can be said, with a great deal of confidence, to be incorrect.

¹³⁷ Statistically, this assumption rests on solid ground. At the time of Whitehurst's birth, life expectancy in the United States was 35. By the time of his death, it was 40. See Max Roser et al., *Life Expectancy*, revised Oct. 2019, at <https://ourworldindata.org/life-expectancy>.

¹³⁸ While working on this article, I conducted a deep dive for Whitehurst's obituary using such search engines as ChroniclingAmerica.gov, NewspaperArchive.com, and Newspapers.com. I also consulted with historians Tom Hambright (Monroe County Public Library) and Melissa Jerome (University of Florida Library).

At the time of Whitehurst's death, Key West had two newspapers: the *Dispatch* and the *Guardian*. See BROWNE, *supra* note 51, at 142. Very few of their issues are extant, and none are available from around the time of Whitehurst's death. See *Key West Dispatch*, LIBRARY OF CONGRESS, at <https://chroniclingamerica.loc.gov/lccn/sn82014743/holdings/>, and *Key West Guardian*, LIBRARY OF CONGRESS, at <https://chroniclingamerica.loc.gov/lccn/sn84027563/>.

¹³⁹ Whitehurst does not have a death certificate because Florida did not begin issuing death certificates until 1877. See RED BOOK: AMERICAN STATE, COUNTY, AND TOWN SOURCES 127 (Alice Eichholz ed., 3d ed. 2004).

Whitehurst himself had retired to Key West where his only daughter [sic] became engaged to a visiting European count. The doctor raised passionate objections to this mismatch with “Count No-account.” The daughter insisted on going ahead with the marriage even if it broke her father’s heart. Whitehurst refused to attend the wedding ceremony. Instead he stayed home and killed himself by taking poison.¹⁴⁰

At the back of his book, Carter explains the basis for his provocative statement. In its entirety, it reads: “Whitehurst papers in Dade [sic] County Public Library, Key West.”¹⁴¹

There are two obvious problems with Carter’s story. First, Whitehurst had two daughters, not one. Second, of course, the Key West Public Library is in Monroe, not Dade (now known as Miami-Dade), County.¹⁴² But because he died in 1988, it is not possible to ask Carter about these errors.

Nevertheless, Carter’s reputation makes it impossible to simply dismiss his assertion:

SAM DIED on Dec. 28, 1988, at the Pomperaug Health Center, near his home in Southbury, Conn. His literary career, one of the longest and most distinguished among Princeton alumni, began on the campus with the Triangle Club, which fired his interest in music, the stage, and writing. After study at Oxford and the Sorbonne, Sam lived in Europe and poured out short stories and articles for the SATURDAY EVENING POST, COLLIERS, and other magazines. He returned to America in the 1930s and began a career of several decades in radio, television, and movies, in N.Y.C. and California. He wrote innumerable scenarios, rewrote popular plays for radio, staged productions with original casts, and was associated with prestigious companies. The editors of the READER’S DIGEST highly valued his literary prowess and advised him to concentrate on books. The result was a stream of brilliant works—20 in all—on American history, especially the War of 1812 and the Civil War. . . .¹⁴³

¹⁴⁰ CARTER, *supra* note 30, at 347.

¹⁴¹ *Id.* at 369 n.9.

¹⁴² At the start of my research, I asked one of my university’s librarians to contact the Monroe County Public Library. It responded by forwarding copies of its entire Whitehurst file. See E-mail from Breana K. Sowers, Florida History Department Archivist, Monroe County Public Library, to Alison F. Rosenberg, Assistant Director—Research & Reference, NSU Panza Maurer Law Library, Jan. 22, 2019, at 1:50 p.m. (copy on file with the author). The file contains no information about Whitehurst’s death. Of course, it is possible that such information was in the file when Carter looked at it and has become lost.

For the sake of completeness, at the end of my research I contacted the Miami-Dade County Public Library. It advised me that it has no Whitehurst materials. See E-mail from Giselle Alonso, Florida Collection Librarian, Miami-Dade County Public Library, to the author, Feb. 1, 2021, at 2:13 p.m. (copy on file with the author).

¹⁴³ *Samuel T. Carter III* ’27, 89 PRINCETON ALUMNI WKLY. 47 (Feb. 22, 1989) (capitalization as in the original).

As will be recalled, Wickman in her book states: “Kate was married to a Spanish military officer, but the two never lived together as man and wife.”¹⁴⁴ In her 1919 passport application, Kate explains that her husband was Elias Moscoso; that he was born in Ferrol, Spain; that he immigrated to the United States from Havana in November 1871 and proceeded to live in Key West until 1875; that he never became a U.S. citizen; and that he died in 1879.¹⁴⁵ These facts line up with Carter’s insistence that Whitehurst was distraught over Kate’s marriage to a European suitor.

Further support for Carter’s contention is contained in Browne’s 1912 book about Key West. While writing about another disreputable local figure he identifies only as “the Spanish Doctor,” Browne says “he was, as Dr. Mason Whitehurst said, a second ‘Count Fosco.’”¹⁴⁶ The name “Fosco” is close to “Moscoso,” and Browne was recalling what Mason had said after the passage of more than three decades. Moreover, Mason refers to Fosco as a count, the same title used by Carter in describing Moscoso.

On Ancestry.com, a member named Geoffrey Thompson has put up his family tree. Thompson reports that “Elias Moscase [sic] y Marcet [sic]” married “Mary Catharine [sic] Whitehurst” on January 19, 1872, in “Monroe [sic], Florida,” and that the couple had no children.¹⁴⁷ Ignoring his various misspellings and omissions, Thompson’s posting provides Carter’s tale with additional support.

That Kate and Moscoso did get married in Key West on January 19, 1872, is indisputable. The ceremony took place at Saint Mary Star of the Sea, Key West’s oldest Catholic church (founded 1852),¹⁴⁸ and their marriage license records are readily available on-line.¹⁴⁹ Whether Kate was a practicing Catholic, or simply gave

¹⁴⁴ WICKMAN, *supra* note 15, at 213.

¹⁴⁵ See Mary Catherine Whitehurst Passport Application, *supra* note 103, at 1. Ferrol is a city in Galicia in northwestern Spain. Historically, it has been known for its shipyards. Today, it also is famous for being the birthplace of the Spanish dictator Francisco Franco. More information about the city can be found on its official web site at <https://www.ferrol.gal/>. See also MAXWELL FOX, TRAVEL LIKE A LOCAL: MAP OF FERROL (2018).

¹⁴⁶ BROWNE, *supra* note 51, at 183.

¹⁴⁷ See Geoffrey Thompson, *Elias Moscase y Marcet—1910*, ANCESTRY.COM, at <https://www.ancestry.com/family-tree/person/tree/173136889/person/252249636329/story>. Among his many typographical errors, Thompson misspells “Marset,” substituting a “c” for the “s.” See, e.g., *Elias Moscoso y Marset*, MYHERITAGE.COM, at <https://www.myheritage.com/research/record-1-260562921-1-500367/elias-moscoso-y-marset-in-myheritage-family-trees> (explaining that Moscoso’s parents were Vicente Moscoso Vasquez and Teresa Moscoso (nee Marset Cucurella) and that he had three sisters: Adelaida (b. 1841), Emilia (b. 1842), and Elisa (b. 1849)). I have not been able to find a birth year for Moscoso. *But see infra* note 158 (suggesting that Moscoso was born in 1840).

¹⁴⁸ See BROWNE, *supra* note 51, at 34-35 (describing the church’s history). In 2012, Saint Mary was recognized as a minor basilica. See *Basilica of St. Mary Star of the Sea, Key West, Florida, USA*, GCATHOLIC.ORG, at <http://www.gcatholic.org/churches/northamerica/5328.htm>. For a further look at Saint Mary, see <https://stmarykeywest.com/>.

¹⁴⁹ See *Florida Probate Records, 1784-1990 Monroe Deeds 1871-1873 vol H*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/3:1:3Q57-99Q5-K4N X?i=78&cc=2046765&cat=296331>. I thank Tamara Hallo of Hallo Genealogy Services of Miami (<https://www.hallogenealogyservices.com/>) for bringing these records to my attention.

into Moscoso's wishes, is unknown. Certainly, however, Henrietta, being Catholic, would have pushed her oldest daughter to have a church wedding.

If one searches for Moscoso in the Hispanic Digital Library,¹⁵⁰ one finds 10 articles, published in various Spanish periodicals, that report on his naval career.¹⁵¹ The last one appears in the July 6, 1870, issue of *La Iberia*. It describes Alférez (Spanish for "Ensign") Moscoso's participation in a successful effort to recover a cache of munitions that had been landed by Cuban rebels from aboard the steamer *George B. Upton*.¹⁵²

Moscoso deserted the Spanish Navy shortly after the *Upton* raid. On October 5, 1870, Commander Tomás Valarino y Badino ordered Moscoso to present himself within 30 days and explain why funds entrusted to his care while serving as the executive officer on the gunboat *Eco* could not be located.¹⁵³ Receiving no reply, Valarino reissued his order on December 12, 1870¹⁵⁴ and again got no reply. Four days earlier, a New York newspaper had reported:

Another naval paymaster has absconded with funds entrusted to his care, and sough safety with his ill-gotten gains upon American shores, where extradition treaties with Spain are not known. The guilty fellow this time is Lieutenant Elias Moscoso, paymaster of the . . . gunboat *Eco*, and the amount of his defalcation foots up \$18,000. Verily, Admiral [José] Malcampo is having a vexing time of it with the paymasters of his fleet, among whom honesty seems to be at a discount.¹⁵⁵

If Whitehurst did kill himself on the day of Kate's wedding, Wickman's reporting that Moscoso and Kate never lived together as man and wife makes sense—it would be hard to imagine a more challenging way to begin a marriage. And it also would explain why, after more than three years of waiting, Moscoso decided to leave Key West in 1875. It appears, however, that the family and Moscoso did not harbor any ill will towards each other. In September 1872, for example, Henrietta had Moscoso serve as one of her two witnesses when she decided to sell a plot of land at the corner of Duval and Greene Streets for \$1,000 to a local grocer named Jacinto Borroto.¹⁵⁶

¹⁵⁰ See "Hemeroteca Digital" at <http://hemerotecadigital.bne.es/>.

¹⁵¹ These articles, of course, support Wickman's statement that "Kate was married to a Spanish military officer."

¹⁵² See *Noticias Generales*, LA IBERIA, July 6, 1870, at 3. By this time, the incident had been reported on by many U.S. newspapers, but none of them mention Moscoso by name. See, e.g., *Disaster to Another Cuban Expedition—Capture of the Steamer Upton*, SUN (Balt.), June 6, 1870, at 1.

¹⁵³ See *Comandancia general de Marina del Apostadero de las Habana* [General Command of the Havana Naval Station], GACETA DE LA HABANA [*Havana Gazette*], Oct. 7, 1870, at 22.

¹⁵⁴ See *Vapor San Francisco de Borja* [Steamer San Francisco de Borja], GACETA DE LA HABANA, Dec. 17, 1870, at 59.

¹⁵⁵ *Another Defalcation*, WORLD (NY), Dec. 8, 1870, at 1. Today, \$18,000 would be worth \$399,227.48. See Friedman, *supra* note 58.

¹⁵⁶ See *Florida Probate Records, 1784-1990 Monroe Deeds 1871-1873 vol H*, FAMILYSEARCH.ORG, at <https://www.familysearch.org/ark:/61903/3:1:3QS7-99Q5-K4ML?i=185&cc=2046765&cat=296331>. I again am indebted to Ms. Hallo, see *supra* note 149, for bringing this record to my attention.

In the previously mentioned 1880 federal census, Kate is identified as “Kate Moscoso” and is shown living with her mother Henrietta, sister Laura, and brother Mason.¹⁵⁷ In all later records that I have been able to find, including her death certificate, Kate’s last name always appears as “Whitehurst.”

Going into the marriage, Moscoso had four strikes against him: 1) he was much older than Kate;¹⁵⁸ 2) he had known Kate for only a short period of time;¹⁵⁹ 3) he was a military deserter;¹⁶⁰ and 4) he was a thief.¹⁶¹ These facts undoubtedly would have been very upsetting to Whitehurst.¹⁶² Moreover, as a doctor, Whitehurst would have known exactly how much poison to take to kill himself.¹⁶³ Thus, as noted at the outset of this section, Carter’s claim that Whitehurst committed suicide cannot be dismissed easily.

IV. CONCLUSION

Even with the foregoing corrections and additions, Whitehurst remains an elusive character. Clearly, however, his role in the development of Key West deserves more notice. Likewise, his successful effort to reunite the Keys should be more widely lauded. Lastly, his death provides tantalizing clues for future research on 19th century suicides.¹⁶⁴

¹⁵⁷ See KEY WEST—1880 U.S. CENSUS, *supra* note 86, at Lines 9-12. This census incorrectly lists Kate as being married, when we know from her 1919 passport application, see *supra* note 103, that by this time she was a widow.

¹⁵⁸ As previously explained, see *supra* note 147, I have been unable to find Moscoso’s actual birth year. However, Moscoso is included in a list of “aspirantes” (candidates) in the book ESTADO GENERAL DE LA ARMADA PARA EL AÑO DE 1863 (“General State of the Navy for the year 1863”) 51 (1862). Given the birth years of his sisters, this suggests that Moscoso was born around 1840, making him 17 years older than Kate. Of course, Whitehurst was 13 years older than Henrietta when they married. See *supra* text accompanying note 30.

¹⁵⁹ It is impossible to say just how long Kate and Moscoso knew each other before they got married. In her 1919 passport application, Kate says Moscoso came to Key West in November 1871. See *supra* note 103 and accompanying text. If this is correct, then the pair knew each other for only two months. Newspaper reports, however, put Moscoso in America by December 1870. See *supra* note 155 and accompanying text. Thus, it is possible that Kate and Moscoso knew each other for a year before getting married.

¹⁶⁰ See *supra* text following note 152. In contrast, Whitehurst served his full tour of duty and left the army as a respected officer. See *supra* notes 20-21 and accompanying text.

¹⁶¹ See *supra* note 155 and accompanying text. Of course, with a fortune of nearly \$400,000, see *id.*, Moscoso would have had no trouble providing for Kate.

¹⁶² Whether Whitehurst would have counted Moscoso’s nationality as a fifth strike against him is hard to say. One assumes not, given that Whitehurst had known many Spaniards during his time in St. Augustine. See *supra* text accompanying note 20.

¹⁶³ Of course, there is a chance that Carter might be right that Whitehurst killed himself but wrong about the method of execution. In 1870, for example, there were 1,294 reported suicides in the United States. Of these, 379 were committed by hanging; 251 by gunshot; 203 by poisoning; 133 by cutting the throat; 119 by drowning; and 209 by unspecified means. See 2 SECRETARY OF THE INTERIOR, THE VITAL STATISTICS OF THE UNITED STATES xix (1872).

¹⁶⁴ Surprisingly little work has been done on this topic. See, e.g., Christoph Kronenberg, *A New Measure of 19th Century US Suicides*, 157 SOC. INDICATORS RES. 803 (2021)

(canvassing sources); India Miller, “In the Midst of Life We Are in Death: Suicide Coverage in the South During the Civil War Era” (unpublished honors thesis, University of Richmond, Apr. 27, 2015), *available at* <https://scholarship.richmond.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1822&context=honors-theses>.

MR. MARVIN GOES TO KEY WEST

James M. Denham*

ABSTRACT

This essay provides a sketch of William Marvin's first decade in Key West (1835-45). In this period, Marvin, originally from New York, served as the territory's U.S. district attorney (1835-39) and its second territorial judge (1839-45). It was during this time that Marvin became acquainted with the city's wrecking industry and began to develop his interest in salvage law.

KEYWORDS

Criminal Justice, Florida Territorial Courts, Judicial Ethics, Key West, Legislative Codification, Marine Salvage, William Marvin, Wrecks and Wrecking

CONTENTS

I. INTRODUCTION	294
II. BIRTH, EDUCATION, AND ADMISSION TO THE BAR	294
III. RELOCATION TO FLORIDA.....	295
IV. SERVICE AS U.S. DISTRICT ATTORNEY	296
V. LITIGATION AGAINST THE WRECKING INDUSTRY	297
VI. PERSONAL LIFE IN KEY WEST	298
VII. POLITICAL ACTIVITIES	299
VIII. APPOINTMENT TO THE SUPERIOR COURT.....	302
IX. SERVICE ON THE SUPERIOR COURT.....	303
X. REVISED CODE PROJECT	306
XI. REAPPOINTMENT TO THE SUPERIOR COURT	309
XII. REGULATION OF THE WRECKERS.....	311
XIII. END OF THE SUPERIOR COURT	313
XIV. CONCLUSION	314

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I. INTRODUCTION

The three articles that begin this special issue of the *British Journal of American Legal Studies*, penned by Professor Robert M. Jarvis, illuminate important aspects of Key West's 19th century political and legal history. Jarvis demonstrates that while the island city was hundreds of miles south of the U.S. mainland, it was a critical depot in the nation's maritime enterprise. Perched atop the Caribbean, surrounded by dangerous reefs, and vulnerable to lawless elements, the isolated location required legal arrangements to ensure the protection of person and property.

The need for a court was obvious to everyone. Thus, in 1828, Congress created the Southern District of Florida, with President John Quincy Adams appointing James Webb its first judge. The individual who played the most important role in establishing federal authority, however, was Webb's successor, William Marvin, who arrived in Key West in 1835 after his appointment as U.S. District Attorney.

Four years later, President Martin Van Buren appointed Marvin a judge of the superior court, a tribunal possessing both territorial and federal jurisdiction. From this time until his return to New York in 1863, Marvin (with only a brief interruption during the years 1845-47) presided over numerous admiralty cases in Key West and became an internationally recognized authority on salvage law. This essay, however, focuses on Marvin's first decade in Key West (1835-45), when Florida still was a U.S. territory.

II. BIRTH, EDUCATION, AND ADMISSION TO THE BAR

Marvin was born on a farm in Herkimer County, New York, on April 14, 1808.¹ At an early age, his parents (Charlotte and Selden Marvin) enrolled him in the village's primary school, where he "learned spelling, reading, arithmetic, grammar, geography, and received a few lessons imparted by the school master's rod . . . to impress these elementary branches of learning more forcibly."² Marvin excelled as a student, and at 15 began teaching at nearby schools in the winters while returning to work on the family farm in the summers.

In 1826, having turned 18, Marvin decided to set out on his own. Making his way through Pennsylvania on foot, he ended up in Bladensburg, Maryland, where he opened his own school.³

After toying with the idea of becoming a Methodist minister, Marvin was persuaded by his older brother Richard to study law. In 1830, Marvin was admitted to the Maryland bar; in 1834, having returned home, he was admitted to the New York bar.⁴

¹ For biographical sketches of Marvin, see WALTER W. MANLEY ET AL., *THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917*, at 78-83 (1997) [hereinafter *PREDECESSOR COURTS*]; R. Boyd Murphree, *William Marvin, in THE GOVERNORS OF FLORIDA 149-57* (R. Boyd Murphree & Robert A. Taylor eds., 2020).

² Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 *FLA. HIST. Q.* 179, 180 (1958).

³ *Id.* at 180-82.

⁴ *Id.* at 187 (Maryland admission); 193-94 (New York admission). As was the custom at the time, Marvin "read law" (*i.e.*, apprenticed) in the offices of local attorneys (a

III. RELOCATION TO FLORIDA

In December 1834, only a year after establishing a practice in upstate New York, Marvin visited St. Augustine, Florida, on business. This extended trip changed his life.

As Marvin recalled many years later, “I sailed from New York in a Hudson River Sloop of the burthen about ninety tons having on board general cargo of merchandise bound to that place.”⁵ After a tumultuous journey, Marvin reached his destination and soon began meeting the area’s leading attorneys, bankers, and merchants. Among the men he met were Charles Downing, David Levy (Yulee), Judge Robert Raymond Reid, and former Judge Joseph L. Smith—as well as a host of fellow New Yorkers who were seeking their fortunes in East Florida.⁶

In addition to making the local rounds, Marvin visited Jacksonville, a town that at the time had less than 300 residents. Wherever he went, Marvin left a favorable impression. He made friends easily and at one point went on what he described as an “exploring trip” up the St. Johns River with a “party of gentlemen.”⁷

Marvin later credited this sojourn for his appointment as U.S. District Attorney for the Southern District of Florida:

Charles Downing introduced me to Joseph White, then delegate from Florida in Congress, and recommended me to him as a suitable person to be appointed U.S. District Attorney for the Southern District of Florida. Having this endorsement from Downing, who had taken a fancy to me, White recommended to President [Andrew] Jackson my appointment to that office.⁸

Marvin acknowledged receipt of his appointment on July 21, 1835.⁹ Writing from Phelps, Ontario County, New York, the young lawyer advised that he would need at least until September 1st to arrange his affairs before setting out for Key West.

“Mr. Spellman” in Frederick, Maryland, and the law firm of Tabor and Dean in Albany, New York).

⁵ *Id.* at 194.

⁶ This latter group included Arthur Bronson, Nehemiah Brush, Lot Clarke, George Field, and Solomon E. Mathers. Other New Yorkers who already were in East Florida, or soon would be, were future Judge Isaac H. Bronson and his clerk, George Fairbanks; Alexander Hamilton, Jr.; and John Rodman.

⁷ *Id.* at 196.

⁸ *Id.* at 195. Among the St. Augustine signers of an official recommendation of Marvin to Jackson were John Bradley, John L. Doggett, Charles Downing, John Drysdale, Daniel S. Griswold, Joseph M. Hernandez, Charles Lawton, Benjamin A. Putnam, Robert Raymond Reid, Peter Sken Smith, Frederick R. Weedon, and William H. Williams. See *Recommendation of William Marvin as United States Attorney, April 25, 1835*, in 25 TERRITORIAL PAPERS OF THE UNITED STATES 131-32 (Clarence Edwin Carter ed., 1960) [hereinafter 25 Carter].

⁹ Marvin was given only an interim appointment. See *Commission of William Marvin as United States Attorney (Southern District), June 20, 1835*, 25 Carter, *supra* note 8, at 143-44. Six months later, Jackson appointed Marvin to a full four-year term. See *Commission of William Marvin as United States Attorney (South Florida), January 13, 1836*, *id.* at 223-24.

Marvin's eventual journey from New York to the island city coincided with a hurricane.¹⁰ As a result, he did not arrive in Key West until November 1835.

IV. SERVICE AS U.S. DISTRICT ATTORNEY

Created in 1828, the U.S. District Attorney's Office for the Southern District of Florida lacked continuity during its early years. Its first occupant, William A. McRea—removed within a year of his appointment—was gunned down in the streets soon thereafter.¹¹ McRea's replacement, John T. Stower, accepted the position but never served. After a short period of stability under John K. Campbell, Edward Chandler was appointed in 1834 but, failing to adapt to the climate, soon resigned. In the breach, Jackson appointed local attorney Adam Gordon to the post until Marvin arrived.¹²

The office's constant turnover reflected both the challenges of a tropical climate and the difficulty of administering justice in what many felt was an inhospitable environment for law-and-order. James Webb, the district's first judge, still in office when Marvin arrived, already had summed up the situation in a letter to Joseph White, the territory's Congressional delegate:

[T]he population of this place, will always in great degree, be composed of foreigners from various Governments, [who] are but little acquainted with our habits & customs, & usually form very erroneous & imperfect ideas of liberty, as found in our Country. . . . [M]any of these people are of the opinion, that as soon as they land on our shores, they are at liberty to do as they please, & it is difficult to learn them, except by punishments.¹³

Anglo-American concepts of law-and-order, Webb further opined, were alien to many of the island's inhabitants. In a different letter, Webb described the population as being "composed of a heterogeneous mass, congregated from various parts of the world, many of whom were unacquainted with the operation of our laws, and had for several years been living in a state of unrestrained, and indeed licentious, freedom."¹⁴

From the court's opening session on November 3, 1828, until Marvin arrived in November 1835, the docket groaned under the weight of a seemingly endless number of violent acts. In the first two sessions alone, there were 13 prosecutions for assault-and-battery; five for dueling; three for mutiny; one for resisting process; and even one for helping a prisoner escape. Remarkably, most of the prosecutions resulted either in not guilty verdicts or *nolle prosequis* (*i.e.*, abandonments); some

¹⁰ See *Further Particulars of the Late Gale*, CHARLESTON COURIER (SC), Oct. 31, 1835, at 2.

¹¹ See James M. Denham, *Captain Charles E. Hawkins, "The Key West Tragedy," and the "Unwritten Law," 1827-1830*, 99 FLA. HIST. Q. 237 (2021).

¹² See *Commission of Adam Gordon as United States Attorney (Southern District)*, October 4, 1834, 25 Carter, *supra* note 8, at 51.

¹³ *Judge Webb to Delegate White, October 27, 1828*, in 24 TERRITORIAL PAPERS OF THE UNITED STATES 112, 112-13 (Clarence Edwin Carter ed., 1959) [hereinafter 24 Carter].

¹⁴ *Judge Webb to the Secretary of the Treasury, April 9, 1829*, 24 Carter, *supra* note 13, at 183, 184.

simply “disappeared” from the docket. Of the 13 assault-and-battery cases, for example, only six ended in guilty verdicts and only one went to trial.¹⁵

Over the next few years, the violence continued. Prior to Marvin’s arrival, for example, the clerk of the court recorded six indictments for assault; 17 indictments for assault-and-battery; six for assault with intent to kill; two for assault with intent to ravish (*i.e.*, rape); and nine for murder.¹⁶

Florida’s territorial superior courts operated under federal authority, but as two commentators have noted, they more closely resembled state courts.¹⁷ This was so because they had jurisdiction over contract, criminal, property, and even some probate cases—matters that traditionally are the ken of state courts. As a result, Marvin was responsible for investigating and bringing indictments against offenders of both federal and state laws.

In the years 1835 to 1839, Marvin’s prosecutorial duties bore some continuity to the previous period, but in addition to assault-and-battery (six cases), assault with intent to kill (one), and murder (four), he also prosecuted defendants for assault on the high seas (two), fornicating with a female slave (one), keeping a disorderly house (two), and larceny (six).¹⁸

V. LITIGATION AGAINST THE WRECKING INDUSTRY

It did not take long for Marvin to appreciate the importance of the area’s wrecking industry, especially when it came to adjudicating the claims of wreckers who salvaged cargo stranded on nearby reefs.¹⁹ Marvin arrived in Key West only weeks after a hurricane had driven more than 20 vessels over the reefs.²⁰ The salvors, per their usual practice, had filed exorbitant compensation lawsuits. Marvin, representing the ship and cargo owners, later wrote:

Although this kind of business was entirely new to me, I took charge of it—went into Court and tried several of the cases during the first week after my arrival. In less than a month, I had earned and received fifteen hundred dollars in fees charging the established rates.²¹

¹⁵ See Southern District of Florida, *Minutes of the U.S. District Court, 1828-1835*, in the National Archives—Atlanta, GA (Record Group 21, Carta 1: 1-38).

¹⁶ See Monroe County, *Minutes of the Superior Court of the Southern District of Florida, 1830-1840*, at 1-268 [hereinafter *Monroe County Minutes*] (available at the P.K. Yonge Library of Florida History at the University of Florida).

¹⁷ See KERMIT L. HALL & ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990, at 5-20 (1991) [hereinafter LOCAL COURTS]. See also JAMES M. DENHAM, A ROGUE’S PARADISE: CRIME AND PUNISHMENT IN ANTEBELLUM FLORIDA, 1821-1861, at 25-26 (1997) [hereinafter ROGUE’S PARADISE]; Charles D. Farris, *The Courts of Territorial Florida*, 19 FLA. HIST. Q. 346 (1941).

¹⁸ See *Monroe County Minutes*, *supra* note 16, at 277-426.

¹⁹ The best study of the wrecking industry remains Dorothy Dodd, *The Wrecking Business on the Florida Reef, 1822-1860*, 22 FLA HIST. Q. 171 (1944). See also E.A. Hammond (ed.), *Wreckers and Wrecking on the Florida Reef, 1829-1832*, 41 FLA. HIST. Q. 239 (1963).

²⁰ See *supra* note 10 and accompanying text. See also *From Key West*, CHARLESTON COURIER (SC), Oct. 5, 1835, at 2.

²¹ Kearney, *supra* note 2, at 199.

Marvin quickly discovered that Key West was the nerve center of the country's wrecking business:

At the time extensive trade was carried on with Mobile, New Orleans, Galveston, and other ports in the Gulf of Mexico in sailing vessels. The Florida coast was very inefficiently & imperfectly lighted. A reef of coral formation extends along the whole of the Southern point of the peninsula from Cape Florida to the Dry Tortugas, a distance of about 200 miles; it constitutes, as it were, the northern Wall of the Gulf stream. In bad weather, many vessels would be driven ashore on this reef. The cargoes and sometimes the vessels were saved by wreckers and carried into the port of Key West. It was the business of the Court to determine the amount of compensation to be paid the salvors for saving the property and to settle the costs and expenses connected with the landing and storing of the goods.²²

Handling salvage (and other) cases in his private capacity proved very lucrative for Marvin during his time as U.S. District Attorney:

I soon found by experience, that I had but very little business to do in my office as United States District Attorney, but I very soon began to do my full share as a lawyer in all other kinds of law business. In the four years that I was at the bar, I had earned in fees, over and above my expenses of living, about fourteen thousand dollars.²³

VI. PERSONAL LIFE IN KEY WEST

When Marvin, just 27, arrived in Key West in 1835, a whole new world unfolded in front of him. As he later recalled, "The acceptance of this office and removal to Key West changed the whole course and current of my life. I resided no longer in a Northern climate, where the winds, ice, and snow compelled me to live within the doors nine months of the year."²⁴ Instead, he now resided on "an island located half way between the Peninsula of Florida and Cuba, where the bright sun and delightful sea breezes invited one to live in the open air as much as possible, all the year round."²⁵

Marvin also noticed that the inhabitants readily welcomed him into their ranks:

The population consisted of about three hundred and fifty souls. Among the leading businessmen were Fielding A. Browne, Pardon C. Greene, Oliver O'Hara, Charles Wells, George Weaver, Asa and Amos Tift, William H. Wall, and Philip Fontane. James Webb was the judge of

²² *Id.* at 200 (capitalization as per original).

²³ *Id.* Today, \$14,000 is the equivalent of \$394,000. See S. Morgan Friedman, *The Inflation Calculator*, at <https://westegg.com/inflation/>.

²⁴ Kearney, *supra* note 2, at 198.

²⁵ *Id.*

the court and Thomas Easton, Marshal. Adam Gordon and William R. Hackley among the principal lawyers.²⁶

Marvin boarded with Ellen Mallory, which immediately exposed him to all the leading lights of the village, including the hostess's son, Stephen R. Mallory, who eventually became a U.S. senator and later served as the Secretary of the Navy of the Confederate States of America.²⁷ Marvin took an immediate liking to young Mallory, who was a teenager. He allowed him to read law in his chambers. There being no church or public worship in the town, Marvin, Mallory, and several other men of various denominations fashioned a public service out of the Book of Common Prayer. The service remained very popular until regular religious services could be established.

Marvin found "a very pleasant society on the Island, consisting of four or five families[:] the Webbs, the Whiteheads, the Gordons, the Brownes, &c; the rest of the population was mostly fishermen and wreckers."²⁸ Few crops could be grown on the island, leading to a somewhat monotonous diet: "The food of the inhabitants consisted largely of fish and green turtle."²⁹ A small sailing vessel from Charleston (the *Laura*) brought in food, clothing, and other items once a month. As Marvin later recalled, "The principle drawback to [my] comfort and pleasure . . . was the existence of an immense number of mosquitoes, winter and summer, always hungry & venomous. Mosquito nettings were in constant use around our beds at night and often, in our rooms in the daytime."³⁰

VII. POLITICAL ACTIVITIES

Marvin's personality and stature in the community soon led him into politics. Elected in 1836 to a seat on the territory's Legislative Council, Marvin ventured to the capital (Tallahassee) for the first time, and took the oath of office, on January 4, 1837.³¹ It was here, while representing the people of Monroe County, that he learned firsthand the customs and traditions of the South.

Marvin took an active part in the council's deliberations, serving on both the judiciary committee and the schools and colleges committee (chairing the latter).³² He introduced several bills relevant to the administration of justice in Monroe County, and his schools and colleges committee took up a Congressional law authorizing the territory to sell lands to establish the University of Florida (the act

²⁶ *Id.* at 199. For further descriptions of Key West when Marvin arrived, see ROGUE'S PARADISE, *supra* note 17, at 54-57; CANTER BROWN, JR., OSSIAN BINGLEY HART: FLORIDA'S LOYALIST RECONSTRUCTION GOVERNOR 68-80 (1997); JOSEPH T. DURKIN, STEPHEN R. MALLORY: CONFEDERATE NAVY CHIEF 3-35 (1954).

²⁷ See DURKIN, *supra* note 26, at 19.

²⁸ Kearney, *supra* note 2, at 203.

²⁹ *Id.*

³⁰ *Id.*

³¹ See A JOURNAL OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 11 (1837) [hereinafter 1837 JOURNAL] ("William Marvin, the member elect from Monroe County, appeared, produced satisfactory evidence to the House of his election, and on motion of Mr. Downing, took the oath of office, and was admitted to a seat.")

³² *Id.* at 14.

even included a list of trustees for the college and other proscriptions). Yet after studying the matter, the committee concluded that to create such an institution was premature. Marvin's report asserted the proposal was "inexpedient," given the fact that there was a lack of population and other needed resources in the territory.³³

In 1837, the most controversial issue in Florida (and elsewhere in the country) was banking, with advocates introducing numerous bank charter bills. Marvin opposed the idea of banks having the ability to issue their own currency. This position put him squarely into conflict with the numerous delegates who favored bank charters on that basis.

When Eben J. Wood, a member from Franklin County and the chairman of the committee on banking, proposed a bill chartering a bank in his county, Marvin, a "hard money" man, made a speech against the measure. Marvin recalled later:

My little speech, though temperate and not at all personal, enraged Wood. After I had done speaking he said speaking of me to several members sitting around, in rather an undertone, but still, loud enough for me to hear distinctly: "He is a damned rascal! [D]amn him, I'll cut his damned ears off." He repeated the remark once or twice. It flashed upon my mind, as quick as lightning, that I should be obliged to fight him. I had just come into the Territory from the North where dueling was not tolerated, and Wood and many other leading men in the Territory might reasonably think that I would not fight, and so, insult me at their pleasure, and if it should be understood throughout the country, that I could be insulted without properly resenting the insult, my public life would be at once ended. I determined, therefore, in an instant to fight him, and to draw the challenge from him. I immediately, in answer to his threatening words, shook my finger in his face, and said in a full round voice so that the Council could hear me: "You are a damned liar; damn you!"³⁴

Marvin understood that, given the circumstances, he had no choice but to challenge Wood, and made formal arrangements (through a second) to do so. Fortunately, mutual friends resolved the matter sufficiently to avert bloodshed. Marvin's friends even managed to extract a public apology from Wood during a subsequent council session.³⁵ Though recognizing that he probably escaped certain

³³ *Id.* at 37-39.

³⁴ Kearney, *supra* note 2, at 204.

³⁵ *Id.* at 205. The published journals of the Legislative Council offer only oblique references to the Marvin-Wood confrontation, but the incident in question probably occurred on February 9. On February 11,

Mr. Marvin, moved that a committee of three be appointed to enquire into the conduct of E.J. Wood, and William Marvin, members of this house, as exhibited in this House, and in committee of the whole House on Thursday last [Feb. 9], that the said committee have leave to sit during the session of the House, and that they report to this House today at 3 o'clock, and that they have power to send for persons and papers. Which motion prevailed. . . .

1837 JOURNAL, *supra* note 31, at 93. Arthur Macon, Leigh Read, and Ayles B. Shehee were appointed to the committee. *Id.* The committee's findings never were recorded.

death at the hands of an experienced duelist, Marvin recalled years later that the event advanced his standing in the territory: “[T]he whole affair was . . . noised abroad throughout the Territory, and my reputation for bravery was established. To make Ned Wood . . . apologize, won me great credit and popularity.”³⁶

In 1838, Marvin’s constituents selected him to represent them at the Florida Constitutional Convention in St. Joseph, where banking once again was the most controversial issue. Marvin again sided with those who favored tight restrictions and oversight, and he supported those who sought to curtail the industry’s interests. Most observers considered the final draft of the proposed constitution a victory for these forces.³⁷

While Marvin aligned with the anti-bank forces, his primary interest was the judicial branch. Marvin took a leading role in drafting the judiciary provisions (contained in Article V of the proposed constitution) and drew praise for his work. The *Florida Herald and Southern Democrat* newspaper, for example, took note of his skill in working collegially with the other delegates to “establish great principles, and concede[] minor points to the opinion of others.”³⁸ The paper further wrote that Marvin is a “sound Democrat, and able lawyer . . . [and] frequently said at St. Joseph, that he almost regarded as indifferent, the other articles of the Constitution, provided that upon the Judiciary could be made perfect.”³⁹

One year later, Marvin’s fellow citizens elected him to the Florida Senate. The 1839 legislative session proved to be one of the most tumultuous in Florida history. The adjournment of the constitutional convention essentially segued into the Legislative Council’s opening session. The anti-bank Democrats swept into the 1839 council with great momentum. They had prevailed in the recent elections and were determined to rein in the banks by passing a whole host of restrictions. Marvin was with them, and together they largely prevailed.

Once again, Marvin drew praise for his part in enacting these “reforms,” with the *Florida Herald and Southern Democrat* writing: “Thanks principally to Judge Marvin our last Legislature proved itself Loco-foco [*i.e.*, pro-democracy], by providing in every act of exclusive privilege, that it should be always under control of the peoples’ representatives.”⁴⁰ Near the end of the session, both bodies of the council selected Marvin to be a delegate to the first Southern Commercial Convention at Charleston.⁴¹

³⁶ Kearney, *supra* note 2, at 206.

³⁷ For the role played by banking at the St. Joseph Constitutional Convention, see, e.g., JAMES M. DENHAM, *FLORIDA FOUNDER WILLIAM P. DUVAL: FRONTIER BON VIVANT* 258-62 (2015) [hereinafter *BON VIVANT*]; EDWARD E. BAPTIST, *CREATING AN OLD SOUTH: MIDDLE FLORIDA’S PLANTATION FRONTIER BEFORE THE CIVIL WAR* 159-61 (2002); ARTHUR THOMPSON, *JACKSONIAN DEMOCRACY ON THE FLORIDA FRONTIER* 11-15 (1961); DOROTHY DODD, *FLORIDA BECOMES A STATE* (1945).

³⁸ *The Constitution*, FLA. HERALD & S. DEM. (St. Augustine), Apr. 11, 1839, at 2.

³⁹ *Id.*

⁴⁰ *Democratic Reforms*, FLA. HERALD & S. DEM. (St. Augustine), June 27, 1839, at 1.

⁴¹ See ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 63 (1839) (“No. 10—RESOLUTION respecting Delegates to Southern Convention”). Beginning in 1839, the Southern Commercial Convention, held periodically in cities across the South, sought to promote the region’s economic development.

VIII. APPOINTMENT TO THE SUPERIOR COURT

In 1839, James Webb resigned his position as superior court judge of the Southern District of Florida to migrate to Texas.⁴² Marvin was an obvious candidate to succeed him, but there were other strong contenders for the appointment. According to Professor Kermit L. Hall, the appointment of Webb's

successor precipitated the only controversy over a judicial nominee during the Van Buren administration. The conflict stemmed from tensions created by the rise of the Democratic party and [was] exacerbated by the competing expectations of coastal shippers and salvage operators who were affected by decisions of the southern district court. The treacherous shoals and keys off the Florida peninsula regularly snared a heavy toll of vessels entering and leaving the Gulf of Mexico. The decrees of the court in salvage cases amounted yearly to hundreds of thousands of dollars, most of which represented, even with insurance, losses to the shipping community of New York City.⁴³

To protect their interests, the New York shipping community wanted Charles Walker, "who, before moving to Florida in 1838, had been counsel for the New York Dry Dock Company, a firm engaged in coastal shipping and salvage operations around the Florida Keys."⁴⁴ Charles Downing likewise supported Walker, saying that his appointment would be most "sympathetic to the interests of New York shippers[.]"⁴⁵

In contrast, Reid recommended Marvin because of his familiarity with the operations of the court and his sensitivity to the interests of Florida's salvage operators. In his book, Hall asserts that Marvin had

incurred the ire of the shipping interests, who charged that he was too lenient in prosecuting the often aggressive tactics of salvage operators. The bar of Key West, however, endorsed Marvin; his experience would insure continuity and competence in the disposition of the extensive admiralty and maritime business before the court.⁴⁶

Also complicating Marvin's appointment was a conflict within Florida's Democratic Party. Two factions had developed: one led by Governor Richard Keith Call and Charles Downing, and another led by Judge Robert Raymond Reid and David Levy (Yulee). The conflict involved questions over banking, economic issues, and the federal government's conduct of the Second Seminole War (1835-42). The Reid-Levy faction hewed closer to Van Buren's policies than the Call-

⁴² For a biography of Webb, see Hobart Huson, *Webb, James (1792-1856)*, TEXAS STATE HISTORICAL ASSOCIATION, 1952, updated Nov. 1, 1995, available at <https://www.tshaonline.org/handbook/entries/webb-james>.

⁴³ KERMIT L. HALL, *THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-61*, at 40 (1979) [hereinafter *POLITICS OF JUSTICE*].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 40-41.

Downing faction, which eventually became part of the Whig Party in Florida.⁴⁷ In early December 1839, Van Buren sacked Call as governor and appointed Reid in his place.

Van Buren granted Marvin a recess appointment (good until the end of the U.S. Senate's next session),⁴⁸ but the Call-Downing faction claimed that Marvin had exploited his new office for personal gain by obtaining from Judge Webb a foreclosure order on a mortgage just before Webb left the bench, which Marvin executed himself.⁴⁹ When Van Buren ordered the matter investigated, Marvin "admitted some 'judicial indelicacy,' but stressed in self-defense that Webb, not he, had issued the foreclosure order."⁵⁰ Satisfied that Marvin was not at fault, Van Buren sent his nomination to the U.S. Senate.

The Senate Judiciary Committee investigated the matter while also mulling accusations about certain Spanish lands grants in Marvin's district. In the meantime, the *Floridian* newspaper fretted that the pending issues may "delay [Marvin's] nomination to the Senate. No better man could be selected."⁵¹ In April 1840, the committee finally confirmed Marvin's nomination.⁵²

Marvin's appointment drew praise throughout the territory. The *Pensacola Gazette* newspaper, for example, enthused that Marvin "will give entire satisfaction. Judge Marvin is an ornament to the bench; he has been long known in Florida as a man of high order of intellect and incorruptible integrity, and his appointment will be hailed with pleasure."⁵³

IX. SERVICE ON THE SUPERIOR COURT

While Marvin's supporters could rejoice in his appointment, Marvin understood the challenges posed by his new position. Not only were the salvage cases piling up, the enforcement of the law, and the administration of justice, had progressed little since Marvin had arrived in Key West in 1835.

Evidence of the problems can be seen in the numerous communications between federal officials on the scene and the authorities back in Washington, D.C. Finding an adequate number of jurors to try criminal cases, for example, remained a serious problem. Lawyers for the accused often availed themselves of their statutory right of 20 preemptory challenges to escape trials. As the U.S. district attorney, marshal, and members of the Monroe County bar explained to Congress and the territorial delegate in an 1840 petition, federal law "authorises the sending of criminals with their indictments to the Eastern or Middle District [of Florida] for trial when there

⁴⁷ *Id.* at 38. On the development of political parties in Florida during this time, see BON VIVANT, *supra* note 37, at 90-263; BAPTIST, *supra* note 37, at 111-19, 154-90; THOMPSON, *supra* note 37, at 7-22; HERBERT J. DOHERTY, *THE WHIGS OF FLORIDA, 1845-1854* (1959).

⁴⁸ See *Commission of William Marvin as Judge (Southern District), March 11, 1839*, 25 Carter, *supra* note 8, at 596-97.

⁴⁹ See *POLITICS OF JUSTICE*, *supra* note 43, at 41.

⁵⁰ *Id.*

⁵¹ [No headline in original], *FLORIDIAN* (Tallahassee), Feb. 15, 1840, at 3.

⁵² See *Commission of Judge Marvin, April 21, 1840*, in 26 *TERRITORIAL PAPERS OF THE UNITED STATES* 132 (Clarence Edwin Carter ed., 1962) [hereinafter 26 Carter].

⁵³ [No headline in original], *PENSACOLA GAZETTE*, May 9, 1840, at 2.

is a deficiency of jurors in Monroe and to bind the witnesses to appear there. Yet it makes no provision for paying the expenses of such witnesses.”⁵⁴

The petitioners provided numerous examples of the district’s inability to prosecute lawbreakers. One man, charged with murder, was sent to Tallahassee for trial but no money was available to cover the cost of the 400-mile voyage for the 13 witnesses against him. Three other persons, charged with capital offenses, had escaped from prison, or been acquitted, due to a lack of jurors. The result, the petitioners explained, was that the community was becoming frustrated and “organizing Lynch tribunals.”⁵⁵

Proof that local citizens were willing to take the law into their own hands came in the summer of 1841, when a mob tarred and feathered the Key West lighthouse keeper. When authorities notified U.S. Secretary of State Daniel Webster that the perpetrators of this outrage remained unpunished, Webster admonished the U.S. district attorney and “other Law officers appointed by this Government, to exert themselves fearlessly and to the utmost of their ability, to bring offenders of this sort to . . . punishment.”⁵⁶ The president, he added, would not tolerate “any degree of delinquency in this respect.”⁵⁷ Several months later, U.S. District Attorney L. Windsor Smith acknowledged Webster’s admonition while recognizing that the district’s chief economic pursuit, as well as its primary shortcoming, was the wrecking industry: “[P]roperty wrecked upon this coast had never adequate protection & very often none at all; & that such property amounted in value to several hundred thousand dollars annually.”⁵⁸

Responding forcefully to the matter of “mob authority” in a presentment to the grand jury for Monroe and Dade Counties, Marvin denounced the

crime . . . vulgarly called *Lynching*. Persons guilty of it establish a tribunal of their own, unknown to and in defiance of the laws; and seize, arraign, try, and punish their victims according to their own wills. They are the judges, jurors, and executioners of their own sentence. . . .

The existence of such a tribunal tends to divert immigration; to drive the quiet citizens from the country; to alarm the whole community by spreading abroad a general sense of insecurity; to destroy all regard for the authority of the law; all reverence for the due administration of justice; all love of order; and, in the end, dissolves the bonds of society, subverts government, and arms man in deadly fury against his fellow man.⁵⁹

Marvin rejected all the supposed excuses for such behavior in “new countries like this”: 1) the laws are defective; 2) there are insufficient numbers of jurors; 3) courts sit too infrequently; 4) jails are non-existent; and, 5) officers neglect their

⁵⁴ *Memorial to Congress from the Officers of the Superior Court, Southern District, March 16, 1840*, 26 Carter, *supra* note 52, at 125, 126.

⁵⁵ *Id.* at 126.

⁵⁶ *The Secretary of State to L.W. Smith, July 8, 1841*, 26 Carter, *supra* note 52, at 356, 356.

⁵⁷ *Id.*

⁵⁸ *L.W. Smith to the Secretary of State, September 17, 1841*, 26 Carter, *supra* note 52, at 376, 376 (emphasis in original).

⁵⁹ *Judge Marvin’s Charge*, FLA. SENTINEL (Tallahassee), Nov. 26, 1841, at 3.



William Marvin (c. 1840)

Photograph courtesy of the Florida Keys History Center-
Monroe County Public Library / Scott DeWolfe Collection /
Flickr MM00045341x

duties. “But if the argument of necessity, which is the tyrant’s argument, where true to the extent it is used,” Marvin exclaimed, “still it would be no justification; for the evils attendant and consequent upon such proceedings are incomparably greater than the evil of permitting offenders to escape punishment.”⁶⁰

Marvin clearly felt that his six years of experience in Key West entitled him to remind the authorities in Washington of the district’s unmet needs. He complained to the territory’s Congressional delegate that the town continued to be “exposed to the aggressions of imported villains. It is a kind of *‘Half Way House’* for travelers upon the high seas. Here they stop, refresh themselves, and not infrequently commit crimes against the laws.”⁶¹ As it had when Marvin arrived, the island city still lacked an adequate jail because the town was too poor to build one:

⁶⁰ *Id.*

⁶¹ *Judge Marvin to Delegate Levy, November 20, 1841*, 26 Carter, *supra* note 52, at 403, 403 (emphasis in original).

Revolts, mutinies, stealing from wrecks, assaults and batteries, and murders upon the high seas, are of not infrequent occurrences on this coast. These are crimes against the laws of the United States. Will not the congress appropriate money for building a jail at a point like this?⁶²

In the meantime, favorable reports about Marvin began to appear. Though not a man of vigorous athletic habits, Marvin, 5'11" with curly black hair, certainly commanded respect. "[A] superficial observer would pronounce him a lazy man," one newspaper reported, "but his *mind*, is always at work, and to the very best advantage, and he can bend it to the severest tasks."⁶³ Another newspaper called Marvin "a bold, talented, warm-hearted and clear-headed gentleman, of whom the Florida bench may well be proud."⁶⁴

X. REVISED CODE PROJECT

Superior court judges sat once a year in Tallahassee as the Territorial Court of Appeals. Marvin attended his first meeting of this court in April 1841. The session began just as the legislative session was ending, and Marvin had an opportunity to speak with some of the legislators before the court convened. These conversations resulted in Marvin's appointment to prepare a revised code of the territory's laws and submit it to the council as soon as possible.⁶⁵

As Marvin understood his assignment, he was to

complete a revision of the whole body of statutory law, and the digesting and arranging of it into distinct chapters according to subject matter. . . .

The value and usefulness of such a code . . . must depend upon its adaption to the wants and circumstances of the country, and to its arrangement into a system.⁶⁶

Marvin assured the council that he would "spare no labor, to make the work as perfect as his abilities will allow."⁶⁷ Of course, his recommendations eventually would have to be enacted into law by the council.

⁶² *Id.* See also *Presentment of the Grand Jury for Monroe County, Superior Court, May Term 1841*, 26 Carter, *supra* note 52, at 404-05. The territorial legislature similarly recognized the problem and passed a resolution requesting an appropriation for a jail at Key West. It claimed the city was "particularly exposed to the aggression of wicked and lawless persons," who were "often arrested and again set at large, or if committed to jail make their escape on account of the insufficiency of the jail." (*By Authority*).—*Acts and Resolutions of the Legislative Council*, STAR OF FLA. (Tallahassee), Apr. 7, 1842, at 1.

⁶³ [No headline in original], PENSACOLA GAZETTE, Jan. 28, 1843, at 2 (emphasis in original).

⁶⁴ [No headline in original], FLA. SENTINEL (Tallahassee), Nov. 26, 1841, at 2.

⁶⁵ See *Resolutions—No. 9*, PENSACOLA GAZETTE, July 17, 1841, at 1 ("[T]he Honorable William Marvin [is] appointed, and requested to revise the laws of this Territory, and to submit a revised code thereof to the Legislative Council. . . .").

⁶⁶ *To the Honorable the Legislative Council of the Territory of Florida*, FLA. SENTINEL (Tallahassee), Jan. 28, 1842, at 1 (communication from Marvin to the Legislative Council dated Jan. 21, 1842).

⁶⁷ *Id.*

According to the *Pensacola Gazette*, Marvin's revised code was expected to be a vast improvement "over the jumble of legislation by which we are now governed."⁶⁸ The work, the newspaper continued,

is one of prodigious labor, even greater than would have been the preparation of an entirely new code of laws. The Digest embodies our whole system (if it may be called a system) of statutory law, arranged alphabetically under appropriate heads. We trust the Legislative Council will adopt the work and have it printed without delay.⁶⁹

The *Gazette* explained that Marvin expected the digest to go into effect in 1844. Among its major innovations would be the reorganization of the territory's court system; abolishing the county courts; expanding the jurisdiction of the justices of the peace; increasing the duties of the county commissions; and creating the office of surrogate (a title the *Gazette* did not fancy) in each county to handle probate matters.

On January 10, 1843, Call informed the council that he had received a letter from Marvin advising him that Marvin had completed his work. Call quickly added: "The general plan and arrangement of the different subjects meets my entire approbation; and from the high reputation of Judge Marvin, for talent and research, I may venture to recommend this production to your favorable consideration."⁷⁰

Territorial Secretary Thomas H. DuVal predicted that Marvin's "Revised Code" would be "adopted with, I believe, but few amendments," and informed U.S. Secretary of State Daniel Webster that he expected the printed volume to run six or seven hundred pages.⁷¹ Everything boded well for Marvin. On hand when the session began, he cheerfully consented to a request to swear in the members. Marvin submitted the manuscript to the council on January 12, 1843, with the statement that "[h]e has labored with ardor and diligence to improve the laws of his country; and to its representatives he now submits the results of his labor to be disposed of as they may think the best interests of the country require."⁷²

The solons created a Joint Select Committee to consider Marvin's work and it was resolved that the first hour of each day be set aside to study the text.⁷³ From there, however, matters deteriorated.

Nearly every day, the committee presented chapters, put them to votes by each house, and then submitted them to the governor for approval. It was a process destined to fail. The *Pensacola Gazette* anticipated the problem by observing: "Judge Marvin's revision of the Statutes is passing rapidly through the House. There is some danger that there will be attempts made to amend or alter that work as prepared by Judge M. and if the work of emendation once commence, there is no knowing where it may stop."⁷⁴ A week later, the *Gazette* added:

⁶⁸ [No headline in original], PENSACOLA GAZETTE, Jan. 28, 1843, at 2.

⁶⁹ *Id.*

⁷⁰ JOURNAL OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 18 (1843) [hereinafter 1843 JOURNAL].

⁷¹ See *Secretary DuVal to the Secretary of State, February 21, 1843*, 26 Carter, *supra* note 52, at 618, 619.

⁷² 1843 JOURNAL, *supra* note 70, at 30.

⁷³ *Id.* at 48.

⁷⁴ [No headline in original], PENSACOLA GAZETTE, Feb. 4, 1843, at 2.

It would seem . . . that Judge M. has not confined himself, as we had supposed, to the condensing and perfecting of the statutes, but that his system proposes thorough changes of many of the laws. Upon some of his attempts at radical changes, the Council seem disposed to pause, and we think, very properly. We have good laws enough, and we certainly do not want to give them up for the chance of getting better laws.⁷⁵

Perhaps Marvin and the compendium's most difficult obstacle was Call, who, despite his earlier endorsement, now seemed to oppose every innovation Marvin proposed. In long-winded responses to both houses, Call struck down chapter after chapter. On March 13, 1843, for example, Call took issue with the chapter titled "Laws":

I find many objections to this chapter, but there is one so cogent and decisive, I deem it unnecessary to present any other.

The third section provides, that "hereafter no English or British Statutes shall have effect, force or authority, in this Territory." The Statute Laws of Great Britain, constitute an essential and indispensable part of the Jurisprudence of this country; and human wisdom cannot penetrate so far into the unknown events of futurity, as to foresee the effect which would be produced in our judicial system by this sweeping and general abolition of these statutes.⁷⁶

Call's remarks seemed to question the whole enterprise:

I am unwilling to discard all the former legislation of this Territory. Many of our acts have been taken from English statutes, and those of different States of the Union. Some of them might be greatly improved; but others are as perfect as we can probably make them and will compare with any of the chapters passed during the present session. It would be well for us to understand the old law before we undertake to make a new one; otherwise we may, after expending much time and labor, discover the humiliating truth, that we have produced a new statute-book, but one greatly inferior to that we have abolished.⁷⁷

The council adjourned on March 16, 1843, with only a portion of Marvin's work approved. While recognizing Marvin's "sagacity and intelligence," the *Pensacola Gazette* applauded the council's decision not to approve Marvin's work:

[W]e cannot but feel assured that he had some better reason than occurs to our poor understanding, for thus attempting the establishment of a new code of laws, instead of bending his mind to the improvement of the old system. . . . No man would be likely to produce a better code than Judge Marvin, but we want no code; and when we formerly expressed the hope

⁷⁵ [No headline in original], PENSACOLA GAZETTE, Feb. 11, 1843, at 2.

⁷⁶ 1843 JOURNAL, *supra* note 70, at 209.

⁷⁷ *Id.* at 210.

that the labors of Judge M. might be adopted, we did so under the belief that those labors consisted mainly, if not exclusively, in condensation of the old laws.⁷⁸

In the end, there would be no publication of any part of Marvin's work. Whether Marvin received compensation for his labors is unknown.

XI. REAPPOINTMENT TO THE SUPERIOR COURT

In March 1844, President John Tyler nominated Marvin for a new four-year term as judge. By this time, Call, in his annual address to the Legislative Council, had made oblique references to officials who had violated the revenue laws by speculating on the territory's public funds.⁷⁹ Specific charges against Marvin soon were forthcoming. On March 14, 1844, Call assembled evidence that Marvin had paid into the territorial treasury \$1,035.45 in scrip rather than the gold and silver he had received from an estate (belonging to a decedent named Isaac Frith) that had escheated to the territory.⁸⁰ Because the scrip was discounted, and an 1829 law made it unlawful for "any person charged with the *collecting* or *paying over* money into the Treasury of this Territory, to speculate directly or indirectly in claims against the Territory,"⁸¹ Call accused Marvin of malfeasance.

Both houses investigated the matter. The senate's committee deferred the issue to the proper judicial tribunal while issuing a minority report, authored by the committee's chairman, that essentially adopted Call's charges. The house's committee found no wrongdoing and went so far as to suggest that Call's accusations were the product of malice. Call responded to the house's report by claiming that the "net 'avails' of [Marvin's] speculation[,] forbidden by law, amounts to upwards of \$600.00 on a capital fund of \$1,035.45."⁸² Call also claimed that in the course of defending Marvin, the house committee had made "accusations, and vague personal insinuations[,] against myself, the Treasurer of the Territory, and others,"⁸³ the effect of which was to "shield the Judge from either civil or criminal process."⁸⁴

To rebut Call's charges, Marvin published a lengthy statement addressed "To the People of Florida."⁸⁵ In it, Marvin explained that he had paid the money into the territory's treasury while he was in Tallahassee attending the court of appeals. By this time, according to Marvin, the 1829 statute was a

dead letter upon the statute book, and long before I paid this Scrip into the Treasury, it had been practically repealed and [annulled] by both people

⁷⁸ [No headline in original], PENSACOLA GAZETTE, Mar. 25, 1843, at 2.

⁷⁹ See JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE TERRITORY OF FLORIDA 6, 12 (1844) (message of Governor Richard Keith Call, Jan. 5, 1844).

⁸⁰ *Id.* at 266-70.

⁸¹ *Id.* at 12 (emphasis in original).

⁸² *Id.* at 269.

⁸³ *Id.* at 266.

⁸⁴ *Id.* at 267.

⁸⁵ See William Marvin, *To the People of Florida*, FLA. HERALD & S. DEM. (St. Augustine), June 11, 1844, at 2.

and Government. That the Treasurer considered this law as entirely obsolete, at the time of my paying this Scrip, is evident from the fact, that he received it without objection. . . .⁸⁶

In his missive, Marvin further insisted: “That the Governor and the Council considered the law obsolete, and without force at that time, is evident from the fact, that by a solemn act passed some weeks afterwards they ‘revived’ it. . . . [This was done] *after* I paid the Scrip[.] [S]hall [it] have a retroactive effect, so as to make a transaction which was lawful at the time, unlawful by reason of subsequent legislation[?]”⁸⁷

Marvin then broadened his rebuttal by insisting that “the attack made on me was intended to reflect prejudicially upon the whole bench,”⁸⁸ and added:

[I]t is high time for you to consider, whether the existing Courts are to be preserved in their integrity—and the Judges in their purity and independence, or whether the former are to be demolished, through the effects wrought out by legislative clamour, and the latter debased and corrupted by being driven, in self defence, to enter into political intrigues and combinations, and compelled to court legislative and popular favor by base arts and servile sycophancy. Honest men will not do this—demagogues will. If you prefer the former for your Judges, keep your eye up the latter. Being no longer a judge myself, [Marvin’s term by this time had expired], I speak with freedom, and exhort you, as you love your dearest interests, to protect your judiciary and thus aid in the wholesome administration of justice.

For myself, I will only add, that I never sought the office of judge, so, if it be the pleasure of the United States Senate, I shall return to private [life], with as much pleasure, as I entered upon public life. In the discharge of my duties I have courted no man; I have feared no man, and I can therefore join my fellow citizens again, in a private station, with the satisfaction afforded by a clear conscience, as I doubt not others before me have done, who have been deprived of their offices by the instrumentality of his Excellency [*i.e.*, the governor].⁸⁹

By the time Marvin’s letter was published, the U.S. Senate had confirmed his nomination.⁹⁰

⁸⁶ *Id.*

⁸⁷ *Id.* (emphasis in original).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Tyler nominated Marvin on March 29, 1844; the Senate confirmed him on May 10, 1844. See *Commission of Judge Marvin (Southern District), May 10, 1844*, 26 Carter, *supra* note 52, at 900.

XII. REGULATION OF THE WRECKERS

The foregoing charges came as Marvin once again joined the other superior court judges for the annual session of the Territorial Court of Appeals in Tallahassee. According to the *Pensacola Gazette*, all five judges were present at the opening session.⁹¹ Their work commenced immediately and quickly proved time consuming:

[T]hey certainly labored with a diligence which would do credit to men in any station; sitting generally from ten until three o'clock every day, and devoting their evenings to writing out opinions and consulting authorities. There were upwards of fifty causes on the docket, generally involving questions of much difficulty, and some of them requiring three or four days in the argument.⁹²

The *Gazette* also offered descriptions of the judges. The one concerning Marvin not only commented on his appearance but also provided insight into his temperament:

Judge Marvin . . . is the best looking man of the Court. But for the color of his hair and beard (for he is scarcely over thirty) you might imagine him a Roman praetor. He has a store of legal learning, but rather elementary; his mind I should think is decidedly of the synthetic cast, and his conclusions are almost invariably correct. It is the rare good fortune (or perhaps I should rather say it the great merit) of Judge Marvin to have become very popular without using any of the devices by which popularity is generally acquired.⁹³

Back home, the most significant legal issues facing Marvin involved admiralty matters. In this regard, Marvin was both criticized and praised for his work. On balance, however, Marvin had more supporters than detractors. In 1842, one observer wrote that

in times gone by there has been much complaint by marine insurers and ship owners against the proceedings of the Admiralty Courts at Key West. Grounds for such complaint no longer exist, and certain as I am while Judge Marvin holds the scales he will act independently and mete out to all suitors equal and exact JUSTICE.⁹⁴

After his reappointment in May 1844, Marvin traveled to New York, which was customary for him in the summer months given Key West's oppressive heat and the threat of yellow fever. In October 1844, a critic named "Esperanza" claimed that Marvin's absence from his post was causing substantial hardship:

⁹¹ Sitting with Marvin were Judges Isaac H. Bronson (Eastern District), Samuel W. Carmack (Apalachicola District), Samuel J. Douglas (Middle District), and Dillon Jordan, Jr. (Western District).

⁹² [No headline in original], PENSACOLA GAZETTE, Feb. 24, 1844, at 2.

⁹³ *Id.*

⁹⁴ *To the Editors of the Commercial Advertiser*, N.Y. SPECTATOR, Sept. 10, 1842, at 3 (letter to the editor) (capitalization as per original).

The Judge has been absent since May last. It seems that when appointments are made, a capacity to stand the climate should be a clause of consideration; and if we must be saddled with appointees, who cannot reside but a few months with us, they should not be allowed compensation when absent on matters of pleasure or individual profit.⁹⁵

According to Esperanza, in Marvin's absence salvors and shippers were forced to resort to *ad hoc* arbitration,

where irresponsible individuals are made the medium by which a valuable cargo, may be so dwindled into nothingness, that when the expenses are settled, the original owner finds himself in debt. . . .

This you may deem a sorry picture of poor human nature; but yet you will readily see that human nature is not any better for living on an island, dieted on turtle soup, with a clergyman only preaching the gospel in the winter, and the Honorable Judge of the Court, absent at Saratoga.⁹⁶

In addition to his long absences, there was a perception outside Key West that Marvin favored wreckers. In a case involving the British ship *Aurora* (carrying 1,096 bales of cotton from New Orleans to Liverpool), however, Marvin made his impartiality clear.⁹⁷

When the *Aurora* lodged on a reef near Indian Key with its rudder broken, wreckers arrived and persuaded the captain to unload 200 bales to their boat because of the shallowness of the water and the fact that the vessel was drawing 12 feet. The wreckers then brought the cotton to Key West, where they libeled the ship and cargo for salvage. Upon a careful consideration of the case, Marvin determined that had the wreckers not appeared, the ship's carpenter could have fixed the rudder, and with "good pilotage and in good weather,"⁹⁸ the vessel could have been brought down the inner channel without the need to put in at Key West.

Marvin further determined the wreckers had taken the cotton "for the purpose of giving an appearance of greater value to their services."⁹⁹ Consequently, "the wreckers had practised a fraud upon the master by representing his danger as greater than it was, and had in reality done the barque and cargo an injury instead of a benefit."¹⁰⁰

A Key West-based reporter for the *New York Courier and Enquirer* newspaper subsequently wrote:

Whether this decision be correct or erroneous, it must satisfy people abroad of what we all know here, that Judge Marvin is not at all inclined to favor the wreckers, but is rather disposed to correct any improper

⁹⁵ "Esperanza," *Key West—Curious State of Affairs at Key West—The Way the Wrecking Business is Managed—Is There No Remedy?*, N.Y. HERALD, Oct. 14, 1844, at 1.

⁹⁶ *Id.* (paragraphing altered for improved readability).

⁹⁷ See *The Aurora*, 2 F. Cas. 227 (Fla. Terr. Super. Ct. 1840) (No. 659).

⁹⁸ *Trial in Admiralty*, N.Y. DAILY EXPRESS, Dec. 21, 1840, at 1.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

practices which he may detect among this very necessary and useful class of people. This cause has long since rendered the Judge very unpopular among the wreckers.¹⁰¹

XIII. END OF THE SUPERIOR COURT

As Florida's March 1845 admission to the Union approached, Key West was becoming "more civilized," no doubt in part because of an improvement in the administration of justice. In December 1844, a visitor commented on the changes:

Whoever supposes Key West to be a collection of rude huts inhabited by a roistering, drunken set of sailors, would be as much surprised at its neatly painted, comfortable houses, and groups of stalwart, orderly men, as many of my fellow-passengers were, who for the first time had set foot on its soil. The scenes about the wharves betokened the occupation of the islanders. There were ships, and brigs, and schooners in dilapidated condition. Some hove down with their keels out of water, with men clambering on their sides, and repairing the injuries caused by the rocks on which they had stranded; others were stripped of all their rigging and spars, having been condemned as unseaworthy. About these, lay the beautiful wrecking sloops, with their towering masts, spacious decks, and handsome cabins, like so many pleasure yachts, with their well-dressed crews . . . lounging about the wharf.¹⁰²

The visitor also noticed that

A reformation [has] been made among these hardy sons of the reef by some Cape Cod captains, whose lay missionaries [have] held nightly meetings on board their vessels. The spirit of temperance had also reached here and diffused its blessings, and not a few had foresworn the treacherous cup. In the town we saw many tropical trees, some of the gardens were tastefully arranged, and the whole presented a lively, pleasant appearance.¹⁰³

With Florida's statehood fast approaching, Marvin's tenure as a superior court judge was about to end. In March 1845, the authorities reorganized the state's courts under the plan that Marvin had essentially created under the St. Joseph Constitution. In most instances, the transfer from superior court (federal) to circuit court (state) went smoothly. As one newspaper noted in August 1845, "The courts as now organized, will administer the same laws, under the same forms, and be governed by the same rules as the late U.S. Courts."¹⁰⁴

Home rule meant that Florida had assumed both jurisdiction and monetary responsibility over its criminal affairs. The superior courts, renamed circuit courts,

¹⁰¹ *Correspondence of the Courier and Enquirer*, WHEELING TIMES & ADVERT. (VA), Dec. 24, 1840, at 2.

¹⁰² *Key West*, BUFFALO DAILY COURIER & ECONOMIST, Nov. 22, 1844, at 1.

¹⁰³ *Id.*

¹⁰⁴ *Tallahassee, August 1, 1845*, STAR OF FLA. (Tallahassee), Aug. 1, 1845, at 3.

functioned much as they had before statehood, except that they lacked federal jurisdiction.¹⁰⁵ Article V of the Florida Constitution directed the General Assembly (the Legislative Council's successor) to elect both a judge and a solicitor (*i.e.*, prosecutor) for each judicial circuit to a five-year term. After five ballots, the legislators chose Marvin (over George W. MacRae and L. Windsor Smith) to be the judge of the new Southern Circuit.¹⁰⁶ But as Marvin recalled in his autobiography, "I declined to accept this office, and returned to the practice of law."¹⁰⁷ The maritime knowledge he had gained over the previous decade offered Marvin the opportunity for significant financial remuneration in private practice.

A second factor dissuading Marvin from further service on the bench was the Florida Legislature's adoption of the "alternating system." Under this system, Marvin would have been obligated to hear cases in the state's other circuits. To Marvin, the difficulties, dangers, and hardships of travel—where all the meeting places were reachable only by water—made the prospect of being a circuit judge quite unattractive.¹⁰⁸

Even if the alternating system had not been adopted, however, it is not difficult to believe that Marvin would have turned down the appointment. Within the Southern Circuit, Marvin would have been compelled to hold fall and spring terms in a sprawling area consisting of Benton (now Hernando), Dade (now Miami-Dade), Hillsborough, and Monroe Counties, an area of more than 1,500 miles that also required travel by water.

There was a final reason that the proffered appointment held no appeal: by this time, Marvin, after a short courtship, had decided to marry Harriet N. Foote of Cooperstown, New York. The marriage, although happy, was brief, as Harriet died in 1848, shortly after giving birth to a daughter named Harriet.¹⁰⁹

XIV. CONCLUSION

Even as he rejected a seat on the state's new circuit court, Marvin understood that a federal court soon would be established in Key West and felt certain that he could secure appointment as its judge. While this proved true, Congress was slow to act. Florida's admission bill created one federal district court for the entire state, with its judge holding sessions at Key West, St. Augustine, and Tallahassee. More than a year passed before President James K. Polk named Isaac H. Bronson (who resided in St. Augustine) as its judge.¹¹⁰

¹⁰⁵ On the transition from the territorial court system to the statehood court system, see ROGUE'S PARADISE, *supra* note 17, at 31-34; LOCAL COURTS, *supra* note 17, at 18-24; James M. Denham, *From a Territorial to a State Judiciary: Florida's Antebellum Courts and Judges*, 73 FLA. HIST. Q. 443, 451-52 (1995) [hereinafter *Florida's Antebellum Courts*].

¹⁰⁶ See *Organization of the Judiciary Department*, PENSACOLA GAZETTE, Aug. 2, 1845, at 2.

¹⁰⁷ Kearney, *supra* note 2, at 207.

¹⁰⁸ The alternating system drew criticism from its inception and was repealed within two years. See *Florida's Antebellum Courts*, *supra* note 105, at 452-53.

¹⁰⁹ See Murphree & Taylor, *supra* note 1, at 151-52; PREDECESSOR COURTS, *supra* note 1, at 83; [No headline in original], N.Y. EVANGELIST, May 18, 1848, at 3 (reporting on Harriet's death).

¹¹⁰ See *Appointments by the President*, N.Y. DAILY HERALD, Aug. 13, 1846, at 4.

This situation left Key West without adequate federal authority to adjudicate its still-growing salvage business.¹¹¹ Everyone understood that Key West needed a full-time resident federal judge and Marvin was by far the favorite choice. In March 1847, soon after Congress created the U.S. District Court for the Southern District of Florida, Polk appointed Marvin its first judge.¹¹²

¹¹¹ Existing records indicate that in the breach, Marvin and “the former territorial judges continued to dispense federal justice.” LOCAL COURTS, *supra* note 17, at 21-22.

¹¹² See *Appointments by the President*, DAILY UNION (Washington, DC), Mar. 5, 1847, at 3.

JUDGE WILLIAM MARVIN AND THE LAW OF SALVAGE

Steven F. Friedell*

ABSTRACT

This essay explores the salvage decisions rendered by William Marvin during his time as a judge in Key West (1839-45; 1847-63). It also discusses his celebrated treatise on salvage law (1858), which cemented his reputation as one of America's leading authorities on maritime law. Lastly, it recounts how Marvin superintended the city's notorious wrecking industry.

KEYWORDS

Federal Courts, Florida Territorial Courts, General Average, Key West, Marine Salvage, William Marvin, Wrecks and Wrecking

CONTENTS

I. INTRODUCTION	318
II. MARVIN'S TREATISE	320
III. DETERMINING THE AMOUNT OF THE SALVAGE AWARD.....	321
IV. SALVAGE AND GENERAL AVERAGE.....	326
V. THE JUDGE AS REGULATORY AGENCY	327
VI. MARVIN'S SERVICE BETWEEN 1845 AND 1846.....	330
VII. CONCLUSION	335

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I. INTRODUCTION

In this special issue of the *British Journal of American Legal Studies*, Professor Robert M. Jarvis has cast a light on a judge who made important contributions to the law of salvage during a critical time in U.S. history. As Jarvis observes,¹ William Marvin was a respected expert on maritime law. Other judges also recognized Marvin's abilities,² and courts continue to cite his opinions³ and treatise.⁴ Almost all of Marvin's published opinions involved salvage,⁵ and he published the first American treatise on salvage law in 1858.⁶ It generally is known that Marvin was a

¹ See Robert M. Jarvis, *The Schooner ENTERPRISE: A Forgotten Key West Murder Case*, 12 BRIT. J. AM. LEGAL STUD. 195, 197 (2023).

² See, e.g., *The Kimberley*, 40 F. 289, 298 (E.D. Va. 1888) (saying Marvin was "a learned author, and one of the soundest admiralty jurists which our country has produced."). The editor of *Hunt's Merchant Magazine* printed Marvin's opinion in *Walter v. The Montgomery*, later published at 29 F. Cas. 113 (Super. Ct. S.D. Fla. Terr. 1840) (No. 17,120). In his introduction, the editor wrote, "Judge Marvin, though comparatively a young man, is, we understand, an excellent judge; and the opinion which we publish, shows him to have bestowed much attention to the law of salvage." *The Law of Salvage*, 3 HUNT'S MERCH. MAG. 153, 153 (1840). A later report said that Marvin had given "general satisfaction to all parties interested." *Wrecking at Key West*, 22 HUNT'S MERCH. MAG. 340, 341 (1850). But see *Wrecks, Wrecking, Wreckers, and Wreckees, on Florida's Reef*, 6 HUNT'S MERCH. MAG. 349, 353 (1842) (arguing that admiralty judges in Key West should not be selected from those who "received large fees" from representing wreckers as "[t]he connection is too close between them, and the underwriters do not stand quite so good a chance.").

³ See, e.g., *St. Clair Marine Salvage, Inc. v. Bulgarelli*, 796 F.3d 569, 575 (6th Cir. 2015), quoting *Church v. Seventeen Hundred and Twelve Dollars*, 5 F. Cas. 669 (S.D. Fla. 1853) (No. 2,713).

⁴ See, e.g., *Columbus-Am. Discovery Grp. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992); *Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186, 205 (S.D. Fla. 1981); *Medina v. One Nylon Purse Seine*, 259 F. Supp. 769, 771 (S.D. Cal. 1966).

⁵ Several, however, involved prize. See, e.g., *The Pearl*, 19 F. Cas. 54 (S.D. Fla. 1863) (No. 10,874). One of Marvin's published opinions involves a libel (*i.e.*, complaint) by passengers to recover passage money when their unseaworthy vessel interrupted its voyage in Key West. See *Stone v. The Relampago*, 23 F. Cas. 158 (S.D. Fla. 1849) (No. 3,486). In a case seemingly of first impression, Marvin held that the court had admiralty jurisdiction and that the passengers had a lien on the vessel.

None of Marvin's opinions were officially reported. Most appeared only in the records of the Southern District of Florida. Some appeared in commercial newspapers or in pamphlets. The ones in *Federal Cases*, an unofficial reporter produced by the West Publishing Company between 1894 and 1897, contain several errors. For example, the name of the vessel in *The Tellumah*, 23 F. Cas. 835 (Super. Ct. S.D. Fla. Terr. 1846) (No. 13,823), is misspelled. In the court records, the vessel is spelled "Telumah." See 3 Adm. Rec. 291, available at <https://www.fold3.com/image/27954900>. Other errors include omitting sections of opinions and incorrect identification of cited authority. See Steven F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218, 1224 n.18, 1234 n.61, 1236 n.71 (1979) [hereinafter *Compensation and Reward*].

⁶ See WILLIAM MARVIN, A TREATISE ON THE LAW OF WRECK AND SALVAGE (1858) [hereinafter *WRECK AND SALVAGE*]. The second American treatise devoted solely to salvage was published 100 years later. See MARTIN J. NORRIS, THE LAW OF SALVAGE (1958), now continued as volume 3A of BENEDICT ON ADMIRALTY. Other treatises covered

superior court judge in Key West, Florida Territory, from 1839 until March 3, 1845, when Florida became a state,⁷ and was a district court judge from 1847 to 1863.⁸ What is not generally known is that Marvin decided 15 salvage cases from March 1845 through April 1, 1846. More on that later.⁹

Salvage was a big business in Key West. In most years the aggregate value of vessels and cargoes wrecked on the reefs exceeded \$1,000,000.¹⁰ By one estimate, the court in Key West was hearing most of the salvage cases in the United States and awarding most of the rewards.¹¹ This essay will show Marvin's unique perspective on salvage as a judge who not only heard scores of salvage cases each year and wrote a treatise on the subject, but also was the only American judge authorized to license professional salvors.

This essay will first describe the contributions of Marvin's treatise. It then will discuss Marvin's unique approach to determining the amount of salvage awards; his views of general average as it applies in salvage cases; and his role as a regulator of professional salvors. Finally, this essay explains why Marvin kept hearing salvage

the topic by including long chapters on salvage. *See, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* (1st ed. 1957); GUSTAVUS H. ROBINSON, *HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES* (1939); MELVIN M. COHEN, *ADMIRALTY—JURISDICTION, LAW, AND PRACTICE WITH AN APPENDIX, CONTAINING RULES, STATUTES, AND FORMS* (1883). American lawyers in the 19th century also had access to English treatises on salvage. *See, e.g.*, WILLIAM R. KENNEDY, *A TREATISE ON THE LAW OF CIVIL SALVAGE* (1st ed. 1891); EDWYN JONES, *LAW OF SALVAGE AS ADMINISTERED IN THE HIGH COURT OF ADMIRALTY AND THE COUNTY COURTS WITH THE PRINCIPAL AUTHORITIES, ENGLISH AND AMERICAN* (1870).

⁷ *See* An Act for the Admission of the States of Iowa and Florida into the Union, 5 Stat. 742 (Mar. 3, 1845).

⁸ *See Marvin, William, in* FEDERAL JUDICIAL CENTER, *BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT*, at <https://www.fjc.gov/history/judges/marvin-william> [hereinafter MARVIN FJC BIOGRAPHY]; *THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917*, at 82 (Walter W. Manley II et al. eds., 1997); Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 FLA. HIST. Q. 179, 206 (1958). President Martin Van Buren granted Marvin a recess appointment on March 11, 1839. *See* 25 TERRITORIAL PAPERS OF THE UNITED STATES (1834-1839), at 596-97 (Clarence Edwin Carter ed., 1960). The U.S. Senate confirmed his appointment the following year. *See Appointments by the President*, MORN. HERALD (NY), Apr. 27, 1840, at 1. President John Tyler nominated Marvin to continue as judge after April 21, 1844, when his previous commission expired. *See* 6 J. EXEC. PROC. S. U.S. 251 (1841-1845). The court was "subject to all the laws which regulate or govern" other superior courts. *See* An Act to Establish a Southern Judicial District in the Territory of Florida, Act of May 23, 1828, § 1, 4 Stat. 291. Judges of other territorial superior courts likewise were appointed for four-year terms. *See, e.g.*, An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government Thereof, § 5, 2 Stat. 283 (Mar. 26, 1804).

⁹ *See infra* note 112 and accompanying text.

¹⁰ *See* WRECK AND SALVAGE, *supra* note 6, at 2 (showing table of wrecks from 1848 through 1857). Today, \$1 million is the equivalent of \$32 million. *See* S. Morgan Friedman, *The Inflation Calculator*, at <https://westegg.com/inflation/>.

¹¹ *See* Memorial of the Marine Insurance Companies of the City of New York (Dec. 15, 1846), National Archives, Senate Judiciary Committee (SEN29A-G8) (copy on file with the author). The memorial was signed by representatives from eight insurance companies asking Congress to establish a permanent Admiralty Court in Key West to hear salvage cases.

cases after Florida ceased to be a territory but before his appointment to the district court.

II. MARVIN'S TREATISE

Marvin's treatise guides lawyers and others in the practice of a salvage case,¹² paying special attention to the procedures in Marvin's court. The treatise begins by explaining the importance of the topic. It notes that the value of ships and cargoes wrecked or in distress and brought into Key West during the previous 10 years amounted to \$16,266,427; that the salvage awarded was \$1,158,919; and that the total expenses, which included salvage, wharfage, storage, duties, repairs, refitting, and all other charges, amounted to \$2,125,384.¹³ Marvin informs us that there were 47 licensed wreckers operating in his district in 1858.¹⁴ The salvage industry benefitted many people working in Key West and was important to international shipping.

The treatise next addresses the duties of the master of a wrecked vessel.¹⁵ Marvin understood that the judge's job was not merely to supervise the salvor's conduct, but also that of others, including the master of the ship that got into distress. In one early case, Marvin refused to restore to the master the proceeds of the cargo and materials because he suspected him of stealing a box of gold coins.¹⁶ Marvin's decision was reversed by the Florida Territorial Court of Appeals due to a lack of proof.¹⁷ In a later case, Marvin refused to restore the cargo to a master who had intentionally run his vessel aground, it having left New Orleans in an unseaworthy state.¹⁸

¹² Marvin provided a good definition and explanation of salvage:

Salvage is a compensation for maritime services, rendered in saving property or rescuing it from impending peril, on the sea, or wrecked on the coast of the sea, or on a public navigable river or lake, where inter-state or foreign commerce is carried on. The amount, according to the maritime law of England and the United States, rests in the sound discretion of the court, upon a full consideration of all the facts of the case. It generally far exceeds a mere remuneration *pro opera et labore* [for work and labor]—the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but, also, as an inducement to others to render like services.

WRECK AND SALVAGE, *supra* note 6, at 105. One can infer the prerequisites for salvage from Marvin's treatment of the need for peril, *id.* at 107-08; the requirement of success in whole or in part, *id.* at 105, 117 n.2; and the requirement that the salvor must be a volunteer, one who has "no particular relation to a ship in distress." *Id.* at 150.

¹³ *Id.* at 2, n.1.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 6-27.

¹⁶ See *The North Am.*, 18 F. Cas. 333 (Super. Ct. S.D. Fla. Terr. 1843) (No. 10,313).

¹⁷ *Id.* at 336 (opinion by District Judge Bronson). The owners of the gold coins subsequently recovered a judgment against the owners of the vessel. See *King v. Shepherd*, 14 F. Cas. 545 (D. Mass. 1844) (No. 7,804), where Justice Story described the master's misconduct in detail and said, "[A] more aggravated case of gross negligence, under circumstances of so little urgency and peril, never came before this court." *Id.* at 551.

¹⁸ See *The Montserat*, 17 F. Cas. 649 (S.D. Fla. 1858) (No. 9,740).

Marvin's treatise then describes the admiralty jurisdiction of the federal district court, the filing of a libel, the seizure or service of process, the response of claimants and intervenors, and the power of the court to sell perishable goods by interlocutory order.¹⁹ In another chapter, Marvin observes that if he suspects collusion, he will *sua sponte* send for witnesses and investigate the transaction.²⁰

Salvage cases moved quickly in Key West. Marvin wrote:

Frequently a ship is got off the reef by the wreckers and brought into port in a condition which will allow her to proceed on her voyage, without the delay of making repairs. In such cases, it often occurs that the libel is filed one day, the master files a claim and answer the next, the court hears and decides the case the third, and the ship proceeds on her voyage the fourth.²¹

The treatise continues with the various charges that might be made against salvaged property.²² It finishes with various miscellaneous items, including a set of forms.²³

III. DETERMINING THE AMOUNT OF THE SALVAGE AWARD

Marvin stressed the need to encourage salvage efforts by paying salvors well. But he also warned against awarding too much.²⁴ In one case Marvin wrote: "[T]he claims of simple justice to the salvor do not ordinarily extend beyond . . . fair compensation. . . . All beyond this is a gratuity given or withheld by the courts upon grounds of public policy."²⁵

In another decision, Marvin reasoned that owners of cargo and vessels and their insurers wanted salvage rates to be sufficiently high to ensure an adequate supply of competent wreckers who could minimize the amount of loss.²⁶ However, Marvin was concerned that giving wreckers too high a reward was not in anyone's long-term interest. Such rewards would encourage too many to become wreckers and thereby would reduce each wrecker's expected earnings.²⁷ He had seen the

¹⁹ See WRECK AND SALVAGE, *supra* note 6, at 28-75.

²⁰ *Id.* at 85.

²¹ *Id.* at 28.

²² *Id.* at 89-98.

²³ *Id.* at 309-37. These are followed by a list of the storage and wharfage rates charged in Key West. *Id.* at 341-43.

²⁴ *Id.* at 106. See generally KERMIT L. HALL & ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990, at 27-28 (1991).

²⁵ The Isaac Allerton, 13 F. Cas. 131, 133 (S.D. Fla. 1856) (No. 7,088).

²⁶ See The York, 30 F. Cas. 818, 820 (Super. Ct. S.D. Fla. Terr. 1846) (No. 18,140).

²⁷ See Pent v. The Ocean Belle, 19 F. Cas. 200, 202 (S.D. Fla. 1861) (No. 10,961). See also The Crown, 6 F. Cas. 917 (S.D. Fla. 1857) (No. 3,450); WRECK AND SALVAGE, *supra* note 6, at 212.

number of licensed wreckers increase from “about 20” in 1846,²⁸ to 33 in 1857,²⁹ to 47 just one year later,³⁰ and he wondered whether salvage rates needed to be reduced.³¹

Marvin also was concerned that masters sometimes wrecked their own vessels to collect insurance.³² In his treatise, Marvin wrote that salvors would forfeit their claim to salvage if they assisted the master in covering up such a plot.³³ Another concern was that the master of a wrecked vessel might collude with the salvor for a share of the salvor’s reward. Marvin expected salvors to inform the court in their libel if they were aware of this.³⁴ In a case involving such a plot, Marvin wrote:

The immorality and illegality of this transaction is too plain for argument or comment. [The salvor’s] duty was, not to listen to the captain’s proposal, but to reject it at once. Let the property be lost, if a captain will not permit it to be saved without the salvor’s consenting to bribe and corrupt him, and that, too, with money belonging to neither of them. The making of such agreement is immoral and unlawful, but when made, it may be lawfully performed, if salvage be allowed, by taking the sum agreed to be given the captain into consideration in fixing the amount of salvage, and making the salvage so much less. In this manner, the agreement may be performed to the owner of the property, who, if anybody, is entitled to the benefit of it, and not the captain.³⁵

In his treatise Marvin lists the factors to be used in determining the amount of the reward, which may be summarized as: the enterprise of the salvors; the gravity of the danger threatening the rescued property; the degree of labor and skill; the time occupied; and the value of the rescued property.³⁶

In 1869, a few years after Marvin retired from the bench, the U.S. Supreme Court in *The Blackwall* gave a similar list of six factors that courts usually use in determining the amount of a salvage award.³⁷ Later writers have tried to analyze

²⁸ See Memorial of Merchants and Other Citizens of Key West, in Florida, 29 Cong., 1st Sess., S. 286, at 1 (dated Apr. 8, 1846) [hereinafter Merchants Memorial] (copy on file with author).

²⁹ See *The Crown*, 6 F. Cas. at 919.

³⁰ See *supra* text accompanying note 14.

³¹ See *The Ocean Belle*, 19 F. Cas. at 202; WRECK AND SALVAGE, *supra* note 6, at 5. A different source reports that there were 47 licensed wreckers in 1850. See *Wrecking at Key West*, 22 HUNT’S MERCH. MAG. 340, 340 (1850). This same source says there were “about 15 regular licensed vessels” in 1845. *Key West and Wrecking for Salvage*, 14 HUNT’S MERCH. MAG. 378, 379 (1846).

³² See WRECK AND SALVAGE, *supra* note 6, at 3.

³³ *Id.* at 112.

³⁴ *Id.*

³⁵ *Church*, 5 F. Cas. at 673.

³⁶ *Id.* at 107, quoting *The Clifton*, (1834) 166 Eng. Rep 349, 351 (Adm.).

³⁷ See 77 U.S. (10 Wall.) 1, 13-14 (1869). The Court listed the factors as follows:

- (1.) The labor expended by the salvors in rendering the salvage service.
- (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property.
- (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was

how courts calculate the amounts of salvage. Gilmore and Black famously wrote, “Eventually the trial judge will pull an arbitrary figure out of the air.”³⁸ Law-and-economics scholars have tried to make sense of *The Blackwall* factors,³⁹ asserting that courts try to determine the amount that the parties would have worked out for themselves had they been able to negotiate freely before the salvage effort began.⁴⁰ The Fifth Circuit adopted this analysis in making the largest salvage award in history (\$4.125 million).⁴¹ It accepted the district court’s reordering of *The Blackwall* factors according to what it thought was the order of their importance.⁴² This prompted another scholar to use statistical analysis to suggest a different order.⁴³

Marvin thought that each wrecker’s compensation should be about what he might earn had he engaged in another pursuit.⁴⁴ He observed that the vessel’s share usually did not exceed \$1,400,⁴⁵ and that in most cases each man’s reward usually came to between \$60 and \$70.⁴⁶ In *The Philah*,⁴⁷ Marvin gave a fuller explanation when he wrote:

[T]he principle of an adequate remuneration, rather than a proportion being established, it is proper to take into consideration all the circumstances of the case, the value of the property and its peril, risk, labor, and enterprize [sic] of the salvors, their character and number, their occupations in life, the size and value of their vessels, the policy of the law in giving salvages, that policy as applicable to this coast, how far and to what extent the necessities of commerce require that persons should be encouraged to engage in the business, as a business, of saving wrecked property, the adequacy of the shares of the several salvors, as a remuneration, in any sum proposed to be given as the total salvage, and other pertinent considerations.⁴⁸

exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

Id.

³⁸ GILMORE & BLACK, *supra* note 6, at 563. Norris said, “There is no set rule or fixed formula” and that “the determination of the amount of a just and proper award is quite often a very troublesome matter.” NORRIS, *supra* note 6, at 375.

³⁹ See, e.g., William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

⁴⁰ *Id.* at 102.

⁴¹ See *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 986 (5th Cir. 1998).

⁴² *Id.* at 984-85.

⁴³ See Joshua C. Teitelbaum, *Inside the Blackwall Box: Explaining U.S. Marine Salvage Awards*, 22 SUP. CT. ECON. R. 55 (2015) (analyzing 881 reported cases from 1799 to 2007).

⁴⁴ See *The York*, 30 F. Cas. at 820.

⁴⁵ See *The John & Albert*, 13 F. Cas. 653 (S.D. Fla. 1851) (No. 7,333).

⁴⁶ See *The Crown*, 6 F. Cas. at 919 (about \$60); *Bennett v. The Tevere*, 3 F. Cas. 234, 235 (S.D. Fla. 1855) (No. 1,325) (between \$60 and \$70); *The John & Albert*, 13 F. Cas. at 654 (few cases where the men’s shares exceeded \$70 each).

⁴⁷ 19 F. Cas. 494 (S.D. Fla. 1857) (No. 11,091A).

⁴⁸ *Id.* at 496-97.

Marvin thought that professional salvors needed to be more generously compensated than the occasional salvor,⁴⁹ a view reflected in the 1989 Convention on Salvage.⁵⁰ In an early opinion, Marvin asserted that the wrecker’s “exclusive business is to give assistance to vessels in distress” and that “[h]e incurs heavy expenses, too, in procuring, fitting, manning, and sailing his vessel.”⁵¹

A large portion of the treatise concerns the amounts of salvage awarded in American and English cases.⁵² Marvin declares, “[N]o increased compensation ought to be given on account of the fact that more salvors were engaged in rendering the service than were necessary.”⁵³ He thought that a greater proportion ought to be awarded when a vessel *and* cargo are saved than when only vessel *or* cargo are saved.⁵⁴ Marvin refused to reduce a salvage award where the wreckers were able to save a ship and its cargo in “an unusually short period of time.”⁵⁵ To do otherwise might induce wreckers to wait until the vessels be lost “by their own positive inertness, misconduct or bad faith.”⁵⁶

Marvin valued highly the saving of human life, saying that a larger award ought to be made for saving steam vessels because they “usually carry many passengers.”⁵⁷ In *The Mulhouse*,⁵⁸ Marvin awarded salvage to those who saved life when others saved cargo in the ensuing weeks.⁵⁹ According to Marvin, those who

⁴⁹ Marvin awarded \$50 salvage to the master of a steamer who signaled to a wrecker to stop and relayed information about another vessel that had run aground. The wreckers’ reward was \$23,000. See *The Crown*, 6 F. Cas. at 920.

⁵⁰ See International Convention on Salvage, Apr. 28, 1989, S. Treaty Doc. No. 102-12, 1953 U.N.T.S. 193, Art. 13, reprinted in 6 BENEDICT ON ADMIRALTY, Doc.4-2A (2021). The treaty lists “the availability and use of vessels or other equipment intended for salvage operations” and “the state of readiness and efficiency of the salvor’s equipment and the value thereof” among the 10 criteria to be considered in determining the amount of the award.

⁵¹ *Walter*, 29 F. Cas. at 116. Years later, Marvin recognized that many wreckers also engaged in fishing for the Havana market. See WRECK AND SALVAGE, *supra* note 6, at 5.

⁵² *Id.* at 181-225.

⁵³ *Id.* at 125. Marvin made the same point in *Sanderson v. The Ann Johnson* 21 F. Cas. 327, 327-28 (Super. Ct. S.D. Fla. Terr. 1843) (No. 12,297A).

⁵⁴ *Id.* at 118-19. He made this point frequently in his opinions. See, e.g., *The Philah*, 19 F. Cas. at 495; *The Isaac Allerton*, 13 F. Cas. at 133; *The Euphrasia*, 8 F. Cas. 813 (S.D. Fla. 1848) (No. 4,545).

⁵⁵ *The Euphrasia*, 8 F. Cas. at 814.

⁵⁶ *Id.*

⁵⁷ See WRECK AND SALVAGE, *supra* note 6, at 125-26. The treatise relied on two English precedents that involved salvage of steamships: *The London Merchant*, (1837) 166 Eng. Rep. 451 (Adm.); *The Raikes*, (1824) 166 Eng. Rep. 88 (Adm.). The one American case cited involved salvage by a steamship. See *The William Penn*, 4 F. Cas. 312 (D.S.C. 1853). Elsewhere, there were several calls for reform. See, e.g., *Duncan McLean, Saving Life at Sea*, BOS. SUN. GLOBE, Aug. 22, 1886, at 12; *Saving Life at Sea*, THE TIMES (London), June 14, 1860, at 9 (reprinting an article from the *Commercial Bulletin* of Boston); Charles Dickens, *Chips: Lives and Cargoes*, 3 HOUSEHOLD WORDS, Mar. 29, 1851, at 18-19.

⁵⁸ 17 F. Cas. 962 (S.D. Fla. 1859) (No. 9,910).

⁵⁹ The full report of the case indicates that the cargo salvage efforts continued for about a month after the lives were saved. See *Rigby v. The Cargo and Materials from the Wrecked Ship Mulhouse* (1859) (available in 1 PAMPHLETS COLLECTED BY ELBRIDGE T. GERRY 681, part of the Gerry Collection of the U.S. Supreme Court Library).

saved life, whether or not they also saved cargo, had a general average charge against all of the cargo saved.⁶⁰ Later American cases have been far less favorable to life salvors.⁶¹

Marvin devotes a chapter of his treatise to the forfeiture of salvage.⁶² He says, “Embezzlement, however small in amount, whether at sea, in port, or after the goods are in the custody of the law, works a forfeiture of all salvage.”⁶³ In *The Diadem*,⁶⁴ Marvin ordered two seamen to forfeit their shares of salvage for embezzlement. In another case, Marvin decreed that the wreckers forfeit their salvage because the wreckers had held the wrecked vessel on the reef “until they had time to lighten her more than was necessary, and in this manner fraudulently magnify their services.”⁶⁵

Marvin’s treatise noted that a salvor “who holds back and quietly looks on at approaching ruin, until his own services become indispensable . . . will find that he is disappointed . . . and . . . renders him an object of contumely and reproach.”⁶⁶ This language is taken from a case where Marvin was the salvor’s proctor (*i.e.*, attorney).⁶⁷ In *The York*,⁶⁸ the crew of a wrecked ship agreed to help save the cargo and the vessel only if they were paid a share of the salvage reward. Marvin wrote that the salvors would have forfeited their salvage if they had encouraged the crew to act that way.⁶⁹ Marvin held salvors to a high standard of honesty in presenting their claims to the court.⁷⁰

Marvin wrote that a salvor’s award might be diminished due to the salvor’s demerits.⁷¹ In one case, Marvin reduced the shares of some salvors who did not return to the stricken vessel to get an anchor.⁷² In *The Diadem*,⁷³ he cut the reward in half because the salvors’ negligence delayed getting the vessel off the reef by a day. In yet another case, Marvin reduced the award from \$23,000 to \$18,000 because the salvors could have saved the stricken vessel more quickly had they taken proper

⁶⁰ See *The Mulhouse*, 17 F. Cas. at 968.

⁶¹ See, e.g., *Markakis v. S/S Volendam*, 486 F. Supp. 1103, 1110 n.28 (S.D.N.Y. 1980) (rejecting claim of life salvage involving rescue of 368 passengers from a disabled vessel off the coast of Cuba); *In re St. Joseph-Chicago S.S. Co. (The Eastland)*, 262 F. 535 (N.D. Ill. 1919), *aff’d without op. sub nom. Mattocks v. Great Lakes Towing Co.*, (7th Cir.) (No. 2,804), *cert. denied*, 258 U.S. 644 (1920) (holding that life salvors are not entitled to a reward when property is saved later). See further *Compensation and Reward*, *supra* note 5.

⁶² See WRECK AND SALVAGE, *supra* note 6, at 226-37.

⁶³ *Id.* at 229.

⁶⁴ 7 F. Cas. 632 (S.D. Fla. 1856) (No. 3,874).

⁶⁵ *The Byron*, 4 F. Cas. 956, 960 (S.D. Fla. 1854) (No. 2,275).

⁶⁶ WRECK AND SALVAGE, *supra* note 6, at 120-21 (note 2 carried over from page 117).

⁶⁷ See *The Howard*, 12 F. Cas. 630, 633 (Super. Ct. S.D. Fla. Terr. 1838) (No. 6,752A) (Webb, J.).

⁶⁸ 30 F. Cas. at 818.

⁶⁹ *Id.* at 819.

⁷⁰ See, e.g., *The Mount Washington*, 17 F. Cas. 925, 927 (S.D. Fla. 1851) (No. 9,987) (“The law just as much exacts fairness and honesty in the salvors in presenting a claim of salvage to the court as it does fidelity and honesty in preserving the property from embezzlement. Salvors are not to impose on the master of the ship or vessel, nor on the court, but to conduct themselves fairly and honestly in regard to both.”).

⁷¹ See WRECK AND SALVAGE, *supra* note 6, at 226.

⁷² See *The Elizabeth Bruce*, 8 F. Cas. 477 (S.D. Fla. 1854) (No. 4,358).

⁷³ 7 F. Cas. at 632.

soundings.⁷⁴ He wrote, “There is not the least reason for imputing to [the salvor] or his associates either fraud or that kind of gross neglect which is tantamount to fraud and which works a forfeiture of all salvage. His error was wholly of the head, not the heart. . . .”⁷⁵ Marvin reduced another wrecker’s reward from \$400 to \$100 because he refused to provide pilotage to a vessel that later ran on a reef and needed the wrecker to provide relief.⁷⁶

IV. SALVAGE AND GENERAL AVERAGE

Marvin’s treatise discusses some points of general average that arise in salvage cases.⁷⁷ The main concern was how to apportion the cost of salvage among the vessel and cargo interests. Marvin’s focus on general average increased two years later when he represented the Chamber of Commerce at the first international conference on general average in Glasgow, Scotland, in September 1860.⁷⁸ The conference produced 11 resolutions intended to guide parliamentary draftsmen.⁷⁹ Following his return to Key West, Marvin issued an opinion in *Roberts v. The Ocean Star*⁸⁰ in which he made an unusual admission of error and detailed seven rules of general average that would guide him in the future:

Some few errors, trifling in their pecuniary results, but still errors, have heretofore been committed by the court in making similar distributions, owing to a want of time to consider fully the questions involved, without detaining the vessel employed to carry on the cargo. To correct these errors, and to prevent their being followed in future, as precedents, is the principal object of this opinion.⁸¹

Marvin did not restate the Glasgow Resolutions but he appears to have been influenced by discussions at the conference. He referred to the practice of French tribunals and the French Code⁸² and to the practice at Lloyds in London.⁸³ To some extent, he enlarged upon points made in his treatise, such as the right of the crew of a vessel that has become a total wreck to be compensated for their labor out of the

⁷⁴ See *The Sultan*, 23 F. Cas. 378 (S.D. Fla. 1858) (No. 13,601).

⁷⁵ *Id.* at 378. See also *The Ashburton*, 2 F. Cas 14 (S.D. Fla. 1856) (No. 575).

⁷⁶ See *The Angeline*, 1 F. Cas. 911, 912 (S.D. Fla. 1854) (No. 385), quoting *The Howard*, 12 F. Cas. at 633.

⁷⁷ See WRECK AND SALVAGE, *supra* note 6, at 172-80.

⁷⁸ See Kearney, *supra* note 8, at 210; RICHARD LOWNDES & GEORGE RUPERT RUDOLF, THE LAW OF GENERAL AVERAGE AND THE YORK-ANTWERP RULES ¶ 00.73 (15th ed. 2019).

⁷⁹ See N. GEOFFREY HUDSON, THE YORK-ANTWERP RULES: THE PRINCIPLES AND PRACTICE OF GENERAL AVERAGE ADJUSTMENT 8 (4th ed. 2018). The Glasgow Resolutions can be found in LOWNDES & RUDOLF, *supra* note 78, at Appendix 2A. The Glasgow Resolutions form the backbone of the York-Antwerp Rules, which are incorporated into nearly all bills of lading.

⁸⁰ 20 F. Cas. 902 (S.D. Fla. 1860) (No. 11,908).

⁸¹ *Id.* at 902.

⁸² *Id.* at 903, 905.

⁸³ *Id.* at 905.

cargo saved, and in extraordinary circumstances to receive salvage.⁸⁴ Among other matters not previously discussed in his treatise, Marvin set forth rules for sharing expenses of unloading a vessel that reaches a port in distress⁸⁵ and the expenses of delay and transshipment.⁸⁶

In 1864, Marvin represented the Chamber of Commerce and the Board of Underwriters of New York at another conference on general average in York, England. Marvin's scholarly report of the proceedings was published two years later.⁸⁷

V. THE JUDGE AS REGULATORY AGENCY

Although some of the rules set forth in *The Ocean Star* were pertinent to the issues raised by that case,⁸⁸ the opinion reads like a set of regulations governing general average. Indeed, the court in Key West gradually had taken on the character of a regulatory agency, issuing and renewing licenses for salvage, having the power to revoke those licenses, and promulgating rules that constrained the wreckers' activities. In 1846, a group of Key West residents had petitioned the President and Congress to create a federal district court in Key West to "control" the wreckers operating there.⁸⁹

Although Congress expressly granted the judge of the Southern District of Florida the power to grant licenses to wreckers only in 1847,⁹⁰ the judges of the territorial court had licensed wreckers earlier. The 1828 statute establishing the territorial court provided, "[N]o vessel shall be employed as a wrecker, unless under the authority of the judge of said court. . . ."⁹¹ One author, in an account of life in Key West, reported that in 1829, "Whilst lying at Indian Key we were joined by five wrecking vessels, whose licenses having expired, it became necessary for them to go down to Key West to renew them."⁹² This means that licenses had been issued

⁸⁴ *Id.* at 903, citing among other authorities WRECK AND SALVAGE, *supra* note 6, at § 149.

⁸⁵ *The Ocean Star*, 20 F. Cas. at 904-05.

⁸⁶ *Id.* at 904.

⁸⁷ See William Marvin, *A System of General Average* (1866).

⁸⁸ Marvin reports that the wreckers heaved the vessel off a reef and "in a condition badly damaged, and leaking." *The Ocean Star*, 20 F. Cas. at 902. Following a decree of salvage, the vessel was condemned, and the cargo was to be transhipped. *Id.*

⁸⁹ See Merchants Memorial, *supra* note 28 and accompanying text.

⁹⁰ See An Act to Establish a Court at Key West, in the State of Florida, and for Other Purposes, Act of Feb. 23, 1847, § 3, 9 Stat. 131.

⁹¹ See Act of May 23, 1828, *supra* note 8, § 6, 4 Stat. 292.

⁹² E.A. Hammond (ed.), *Wreckers and Wrecking on the Florida Reef, 1829-1832*, 41 FLA. HIST. Q. 239, 243 (1962). See also *From Key West*, CHARLESTON COURIER (SC), Sept. 24, 1832, at 2 (reporting an outrage committed upon the ship *Eliza Plummer* but remarking, "none of the regular licensed wreckers were concerned in the transaction"); Charles Nordhoff, *Wrecking on the Florida Keys*, 18 HARPER'S NEW MONTHLY MAG. 577, 584 (1859) (recalling that Judge Webb had said that the wreckers were controlled because "If they commit any offense against honor or justice, instantly I [Webb] take from them their licenses.>"). In one of his first opinions on the territorial court, Marvin referred to the libellants as "licensed wreckers." See *Walter*, 29 F. Cas. at 113. In their petition requesting a federal court in Key West following statehood, the residents said, "There are about twenty regular wrecking vessels licensed by this court." Merchants Memorial, *supra* note 28, at 1.

as early as 1828⁹³ and had to be renewed annually, as later would be the case.⁹⁴ In 2008, Congress repealed the statute authorizing Florida's judges to license salvors.⁹⁵

Beyond licensing, not later than 1853, Marvin regulated wreckers by promulgating a set of *Rules of Wrecking*,⁹⁶ and wreckers were required to show the master of a wrecked vessel their license and a copy of rules.⁹⁷ The first of these 13 rules consisted of a quotation of that part of the 1847 act authorizing the federal district judge in Key West to license wreckers. The other 12 rules sought to eliminate collusion or fraud by wreckers and masters and crew members of wrecked ships. For example, the fourth rule dealt with the situation where multiple salvors were needed to save a vessel and its cargo, a frequent occurrence on the Florida coast. The rule provided:

Licensed wrecking vessels, including the smaller as well as the larger, shall be admitted to assist at a wreck in the order in which the vessels themselves arrive, if further assistance be needed; unless some good cause shall exist for the contrary; and the master of any vessel deeming his vessel and crew excluded without sufficient cause, may apply, by petition to the court, for a distributive share of the salvage.⁹⁸

Marvin explained the purpose of this rule in *The Ocean Belle*:⁹⁹

This rule is obviously just in itself, and sound in policy. It prevents disorders and quarrels at wrecks, and takes away from the first boarder or master wrecker the power, by colluding with the master of the ship, to extort hard terms from those that arrive after him. Before the adoption of this rule and its enforcement by several decisions, it was not uncommon

⁹³ See also WRECK AND SALVAGE, *supra* note 6, at 5 (asserting that the 1828 statute authorized judges to license wrecking vessels). *But see* *The Alamo*, 75 F. 602, 605 (5th Cir. 1896) (quoting the opinion of Judge Locke of the Southern District of Florida, who wrote that “for nearly sixty years” there had been a system of licensing wreckers who are “amenable to rules of wrecking established by the court.”).

⁹⁴ See WRECK AND SALVAGE, *supra* note 6, at 337 (“for the term of one year”).

⁹⁵ See P.L. 110-375, § 1, 122 Stat. 4055 (Oct. 8, 2008). Earlier that year, a court had found the licensing statute to be unconstitutional. See *Towboat One, Inc. v. M/V Waterdog*, No. 08-80162-CIV, 2008 WL 2609505 (S.D. Fla. June 24, 2008). The U.S. Department of Justice had come to the same conclusion. See Response of United States of America to July 5, 2007 Order Notifying United States Attorney General of Challenge to Constitutionality of 46 U.S.C. § 80102, available at 2007 WL 4837219. See also *In re Beck*, 526 F. Supp. 2d 1291 (S.D. Fla. 2007) (declining to issue a wrecking license due to the statute's apparent unconstitutionality but declining to rule on that matter for lack of a case or controversy). The *Beck* court also reported that mariners had largely ignored the statute and that there were only occasional applications for licenses. See *id.* at 1294-95. *But see* *Southernmost Marine Servs. v. M/V Potential*, 250 F. Supp. 2d 1367, 1369 (S.D. Fla. 2003) (describing the plaintiffs as “professional and licensed salvors”).

⁹⁶ See WRECK AND SALVAGE, *supra* note 6, at 338. See also *Rules of Wrecking at Key-West, Fla.*, CHARLESTON DAILY COURIER (SC), June 27, 1853, at 2 (reprinting the rules).

⁹⁷ See WRECK AND SALVAGE, *supra* note 6, at 340 (Rule IX). The rules were annexed to the license. *Id.* at 232.

⁹⁸ *Id.* at 338-39 (Rule IV).

⁹⁹ 19 F. Cas. at 200.

for the first boarder or master wrecker to agree with the master of the ship to give him a portion of the salvage, on condition that the former should be allowed to select the vessels to be employed. . . . [W]hen the wreckers come before the court to recover their salvage, [the master of the wrecked vessel] can properly have no interest beyond the amount to be decreed for the whole service. With the distribution of that amount among the salvors he has no concern. If no improper influences are brought to bear upon him, he will ordinarily employ the wrecking vessels, if adapted to the service required, in the order in which they arrive, for this is obviously just; and if he employs them in any other order, unless his reasons for doing so are satisfactory to the court, it may fairly be inferred that improper influences have been exerted upon him by some of the salvors to the disadvantage of others. Such improper influences are not to be tolerated.¹⁰⁰

In applying this rule in *The Ocean Belle*, Marvin ordered that part of the salvage award be given to five smacks that had been excluded from saving part of the cargo.¹⁰¹ He stressed that this was not an equal share of salvage but “such a share as, under all the circumstances, the court may think they are equitably entitled to, and such as will, under ordinary circumstances, make it the interest of the wreckers, so far as they are concerned, to conform to the rule.”¹⁰²

Marvin also exercised control over wrecking through the court’s rules of procedure.¹⁰³ These rules set rates for lawyer’s fees,¹⁰⁴ and required “salvors having a common interest arising from associated service, or from consortship” to file one libel and be represented by one proctor.¹⁰⁵ In one case, Marvin penalized a consortship for filing a second libel, ordering the second libellants to pay the extra costs that were incurred.¹⁰⁶ He wrote, “One libel was sufficient in the case. There was no conflict of interest, and one libel could be made to present the claims and secure the interests of all the principal salvors.”¹⁰⁷

Another rule set rates of compensation for the master’s agent or consignee for moneys disbursed in payment of wharfage, storage, and other necessary expenses.¹⁰⁸ Marvin also exercised supervisory authority over the marshal, and he

¹⁰⁰ *Id.* at 204-05.

¹⁰¹ *Id.* at 205.

¹⁰² *Id.*

¹⁰³ See WRECK AND SALVAGE, *supra* note 6, at 300-08. The rules took effect on the first Monday in May 1858. See *id.* at 308. An earlier set of rules did not contain these provisions. See RULES OF THE SUPERIOR COURT FOR THE SOUTHERN JUDICIAL DISTRICT OF FLORIDA—IN ADMIRALTY (1840). My thanks to the Duke University library for providing me with a copy of this document.

¹⁰⁴ See WRECK AND SALVAGE, *supra* note 6, at 303 (Rule 8). The proctor’s fee was not reduced if the wrecker’s reward was forfeited or reduced due to misconduct. *Id.* This might be a reason why Marvin specified the amounts of reduction. See *supra* text accompanying notes 72-76.

¹⁰⁵ *Id.* (Rule 9). As Marvin’s treatise explains, a consortship was a type of partnership among wreckers. See *id.* at 250.

¹⁰⁶ See *The Maryland*, 16 F. Cas. 993 (S.D. Fla. 1849) (No. 9,218).

¹⁰⁷ *Id.* at 994.

¹⁰⁸ See WRECK AND SALVAGE, *supra* note 6, at 302-03 (Rule 7).

stressed the importance of the marshal keeping accurate records of the marks upon salvaged boxed and packages.¹⁰⁹

It appears that Marvin’s efforts at regulation were effective. In their petition in April 1846 to Congress and the President to create a district court in Key West, 44 residents, including two insurance company underwriters, wrote:

The necessity of controlling such a body of men, and of watching narrowly their conduct, must be at once apparent. . . . The district judge, appointed by the general government, independent in his action, and far removed from local influences, is the only power that can apply the proper corrective. . . .

It is a remarkable fact that not one instance of theft, of even the smallest article, from the stranded vessel, has occurred for many years in this district. A short time since, the entire cargo of the wrecked ship Rienzi, including hundreds of barrels, boxes, and cases of liquors, was intrusted [sic] to ten or twelve of our wrecking vessels. Their crews, composed of men from every part of the habitable globe, and not less reckless than seamen generally, had entire control of it for several days on the decks of their vessels, and yet not one package was broken, not one article used by them.¹¹⁰

VI. MARVIN’S SERVICE BETWEEN 1845 AND 1846

As mentioned earlier,¹¹¹ Marvin decided 15 cases after Florida became a state but before he was nominated for a federal judgeship.¹¹² These cases are included in the Admiralty Records that were maintained first by the Superior Court and later by

¹⁰⁹ See *The Isaac Allerton*, 13 F. Cas. at 133.

¹¹⁰ Merchants Memorial, *supra* note 28, at 1-2. *The Rienzi* was heard by Marvin in May 1845. See *infra* note 112.

¹¹¹ See *supra* text accompanying note 9.

¹¹² The 15 cases, all contained in volume 3 of the Admiralty Records, are as follows:

CASE NAME	PAGE	DATE OF FIRST RECORD	AVAILABLE AT
Solomon Howes v. The Brig Hayne and Cargo	227	Mar. 22, 1845	https://www.fold3.com/image/27954815
Brig Onico and Cargo	227	Apr. 7, 1845	https://www.fold3.com/image/27954815
Raymond & Packer v. The Ship Yorkshire and Cargo	235	May 10, 1845	https://www.fold3.com/image/27954825
Richard Roberts v. The Cargo and Materials of the Ship Rienzi	240	May 21, 1845	https://www.fold3.com/image/27954832

the District Court in Key West.¹¹³ Two of these cases were later published in West's *Federal Cases*.¹¹⁴ In his autobiography, Marvin skips over this part of his service, writing:

CASE NAME	PAGE	DATE OF FIRST RECORD	AVAILABLE AT
John Washington v. The Barque Globe	254	May 28, 1845	https://www.fold3.com/image/27954849
William Bethel v. The Cargo and Materials of the Ship Newark	262	June 13, 1845	https://www.fold3.com/image/27954860
Augustus Williams v. The Cargo and Materials of the Bark Feronia	267	Sept. 15, 1845	https://www.fold3.com/image/27954867
William Bethel v. The Schr. Atalanta and Cargo	276	Sept. 15, 1845	https://www.fold3.com/image/27954882
John Lowe v. The Brig Georgiana and Cargo	285	Nov. 28, 1845	https://www.fold3.com/image/27954893
Joseph Stickney et al v. The Cargo and Materials of the American Ship Telumah	291	Dec. 3, 1845	https://www.fold3.com/image/27954900
William Kemp v. The Barque Mersey	299	Dec. 11, 1845	https://www.fold3.com/image/27954911
James Packer v. The Ship Southport and Cargo	310	Mar. 12, 1846	https://www.fold3.com/image/27954924
Packer, Gould et al. v. The Brig Mary and Cargo	311	Mar. 12, 1846	https://www.fold3.com/image/27954925
William Pent et al. v. The British Ship York and Cargo	321	Mar. 23, 1846	https://www.fold3.com/image/27954938
William Bethel v. The Schooner Francis and Cargo	328	Mar. 30, 1846	https://www.fold3.com/image/27954947

Although volume 3 of the Admiralty Records do not go beyond April 1, 1846, the day a decision was rendered in *Bethel v. The Francis*, a court in Key West apparently continued to award salvage that year. *See Key West, May 24, 1846*, EVENING POST (NY), June 6, 1846, at 3 [hereinafter *May 24 Evening Post Story*] (reporting on recently decided cases). On May 22, 1846, Marvin gave judgment for the libellant in a non-salvage case that was later reversed by the U.S. Supreme Court for lack of jurisdiction. *See Benner v. Porter*, 50 U.S. (9 How.) 235 (1850).

¹¹³ The records, indexed by the name of the case (with some misspellings), can be accessed at https://www.fold3.com/browse/hnlVbj8D0iB_HqBN-. “The Telumah” is misidentified as “The Selannah.”

¹¹⁴ *See The Tellumah*, 23 F. Cas. at 835; *The York*, 30 F. Cas. at 818.

In July 1845, Florida having ceased to be a Territory and become a State in the Union, the General Assembly elected me Judge of the Circuit Court of the Southern Circuit. I declined to accept this office, and returned to the practice of law. In March, 1847, President Polk appointed me United States District Judge. I accepted this office and performed its duties until I resigned it in 1863.¹¹⁵

Moreover, Marvin licensed wreckers during this time,¹¹⁶ even though one might have thought his authority to do so lapsed when Florida ceased to be a territory. As will be seen, the U.S. Supreme Court ruled in 1850 that the superior courts were abrogated by Florida's statehood.¹¹⁷

It is unclear why Marvin thought he legally could exercise judicial power during this period. Congress created the superior courts "in the territory of Florida,"¹¹⁸ and one would think that these courts went out of existence when Florida became a state on March 3, 1845.¹¹⁹ Part of the answer may be that the territory's dissolution took time.¹²⁰ For example, John Branch, the territorial governor, continued to serve in his post until June 25, 1845, when William D. Moseley became the first state governor.¹²¹

On July 25, 1845, the new Florida state legislature provided for the transfer of all cases in the superior courts that are "cognizable by the Federal Courts, which may be organized in this state . . . to such court. . . ."¹²² This provision is problematic. It is unlikely that the state legislature had any authority to regulate admiralty cases that were pending or might be brought in the superior courts. And even if it had such authority, it is not clear when a federal court in Florida was "organized." Although Congress had created a district court for Florida after it became a state,¹²³ it was

¹¹⁵ Kearney, *supra* note 8, at 207. See also Betram H. Groene, *Justice Samuel Douglas as Governor William Marvin Remembered Him*, 49 FLA. HIST. Q. 268, 273 (1970) (reprinting letter from Marvin saying that when Florida became a state, "the Court of Appeals and the Superior Courts . . . were superceded [sic] by the State Courts, and Judge Douglas and others were left out of office.").

¹¹⁶ See *The York*, 30 F. Cas. at 819 (saying, in a decision dated Mar. 23, 1846, that the wreckers "are regularly and solely employed, under license of this court, in the business of cruising along the reef, and rendering assistance to vessels. . . ."); *May 24 Evening Post Story*, *supra* note 112 (mentioning claims for salvage filed by "licensed wreckers."). Because the licenses previously issued were valid for one year, see *supra* text accompanying note 94, this shows that Marvin must have licensed these vessels after Florida became a state.

¹¹⁷ See *Benner*, 50 U.S. at 248. See also *infra* text accompanying note 135.

¹¹⁸ Act of May 23, 1828, *supra* note 8, § 1, 4 Stat. 291.

¹¹⁹ See *supra* note 7 and accompanying text.

¹²⁰ One writer has concluded that the territorial period may be said to have ended in October 1845 with the appointment or election of all "officers under the state government who succeeded to functions of officers under the territorial government." Charles D. Farris, *The Courts of Territorial Florida*, 19 FLA. HIST. Q. 346, 346 (1941).

¹²¹ See entries for John Branch and William Dunn Mosley at <https://dos.myflorida.com/florida-facts/florida-history/florida-governors/>.

¹²² An Act to Organize the Circuit Courts of the State of Florida, ACTS AND RESOLUTIONS OF THE FIRST GENERAL ASSEMBLY OF THE STATE OF FLORIDA ch. 4, § 8 (1845).

¹²³ See An Act Supplemental to the Act for the Admission of the States of Iowa and Florida into the Union, and for Other Purposes, June 3, 1845, § 3, 5 Stat. 788.

not until May 5, 1846, that President James K. Polk nominated Isaac H. Bronson to fill that seat.¹²⁴ Bronson was confirmed, and received his commission, on August 8, 1846.¹²⁵

Even if the Florida statute authorized Marvin to decide salvage cases until Bronson assumed office, it could not retroactively authorize Marvin to decide cases during the period between the beginning of statehood on March 3, 1845, and the adoption of the statute on July 25, 1845. It is more likely that Marvin thought that his commission to serve on the superior court from 1844 until 1848¹²⁶ gave him sufficient grounds to continue until a federal district judge was appointed for Florida.

Marvin may have shared the view expressed by Bronson when Bronson was still the superior court judge for the Eastern District of Florida. In a letter seeking guidance from the Secretary of the Treasury, Bronson declared:

Congress certainly could not have intended that there should be a kind of interregnum of three or four months, and it is manifest that the public interest would be best promoted by the present Courts and authorities continuing to act until regularly Superseded and the business can properly be transferred to other Courts—And though I am reluctant on the one hand to exercise any power or authority which may be doubtful or questionable—Yet on the other hand I should be equally unwilling to avoid or shun any proper responsibility which may rest upon me in consequence of this conjunction of circumstances or lack of clear legal provision—nor should I regard the question whether my salary was or was not paid, as of controuling [sic] influence, but only as tending to give me your construction of the late acts of Congress and thus aiding me in determining what course I ought to pursue, or how I should construe them.¹²⁷

Marvin also may have taken comfort in the Attorney General's advice that the district attorneys continue to represent the United States in the territorial courts.¹²⁸ The Attorney General had advised the President that although the continued legitimacy of the superior courts was a matter for the courts, "it cannot be presumed to have been the intention of Congress to have produced an abeyance of all Government in Florida."¹²⁹

¹²⁴ See *Bronson, Isaac Hopkins*, in FEDERAL JUDICIAL CENTER, BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, at <https://www.fjc.gov/history/judges/bronson-isaac-hopkins> [hereinafter BRONSON FJC BIOGRAPHY].

¹²⁵ *Id.* But see *Benner*, 50 U.S. at 244 (reciting that a judge was appointed to fill the seat on July 8, 1846).

¹²⁶ See *supra* note 8.

¹²⁷ 26 TERRITORIAL PAPERS OF THE UNITED STATES (1839-1841), at 1032, 1034 (Clarence Edwin Carter ed., 1962) (reprinting letter dated Mar. 28, 1845). The Secretary of the Treasury replied that he could not give an opinion on the court's jurisdiction. *Id.* at 1034 n.9. However, the Solicitor for the Treasury later (Apr. 30, 1845) gave an opinion that the superior courts would continue to have jurisdiction until the state government was in full operation. *Id.* at 1051, 1063.

¹²⁸ *Id.* at 1047 (reprinting letter to the President, dated Apr. 18, 1845).

¹²⁹ *Id.* at 1048.

By continuing to serve, Marvin filled a critical need. During this time, federal courts discouraged masters of wrecked vessels from settling a salvage claim or agreeing to arbitration.¹³⁰ In a letter to President Polk in September 1845, Marvin wrote that because salvage cases could only be brought in an admiralty court, he “did not feel at liberty” to accept appointment to the state court to which he recently had been elected because it “would necessarily leave, for several months, large and important interests at the mercy of the bravest and the strongest.”¹³¹

Congress addressed the matter on February 22, 1847, when it transferred all the cases “of federal character” pending in the superior courts of the “late Territory of Florida” to the District Court of Florida.¹³² The next day, when Congress created the Southern District of Florida, it directed that those cases pending in the Superior Court in Key West be transferred to the new court.¹³³ Pointedly, Congress neither “affirmed or disaffirmed the jurisdiction, power or authority of the territorial courts” to try cases after March 3, 1845, leaving that issue for the U.S. Supreme Court.¹³⁴

The Supreme Court later ruled that the superior court’s jurisdiction was abrogated when Florida became a state.¹³⁵ The Court made one concession to Judge Marvin, saying, “It is to be regretted that proper provision has not always been made by Congress, upon a change of government, in respect to the pending business in the Territorial tribunals, so as to remove all embarrassment and perplexity on the subject.”¹³⁶

When Bronson, as the judge for the District of Florida, made his first judicial visit to Key West in early February 1847, there had not been a salvage case decided there for several months.¹³⁷ During the previous year, insurance companies and Key West residents had petitioned Congress for a locally-based federal judge.¹³⁸ On February 23, 1847, Congress created the Southern District of Florida.¹³⁹ The statute required the judge to reside in Key West and authorized him to license wreckers.¹⁴⁰

¹³⁰ See *Church*, 5 F. Cas. at 672 (saying that neither a settlement nor an arbitration award is *prima facie* valid but that those who claim under it must prove it to be valid). The Federal Arbitration Act, which was adopted in 1925, makes it extremely difficult to overturn an arbitration award. See generally 9 STEVEN F. FRIEDEL, BENEDICT ON ADMIRALTY § 111 (2021).

¹³¹ Letter from Judge William Marvin to President James K. Polk, dated Sept. 15, 1845, available at NATIONAL ARCHIVES (College Park, MD), “Polk, Taylor, Filmore Administrations, 1845-1853,” Microfilm 873, 58(1), slides 553-54 (copy on file with the author).

¹³² See An Act to Regulate the Exercise of the Appellate Jurisdiction of the Supreme Court of the United States, in Certain Cases, and for Other Purposes, Feb. 22, 1847, §§ 1, 8, 9 Stat. 128, 130.

¹³³ See Act of Feb. 23, 1847, *supra* note 90, § 7, 9 Stat. at 131-32.

¹³⁴ See Act of Feb. 22, 1847, *supra* note 132, § 8, 9 Stat. at 130-31.

¹³⁵ See *Benner*, 50 U.S. at 248. *Benner* involved a libel against the proceeds of a wrecking vessel for payment of supplies and stores provided to the master. The superior court had given a judgment of \$1,223.02 in favor of the libellant on May 22, 1846. *Id.* at 235.

¹³⁶ *Id.* at 247.

¹³⁷ See *Correspondence of the Courier*, CHARLESTON COURIER (SC), Mar. 1, 1847, at 2 (dispatch dated Feb. 14, 1847). Marvin appeared in court that day as a proctor. *Id.*

¹³⁸ See *supra* notes 11 and 89 and accompanying text.

¹³⁹ See Act of Feb. 23, 1847, *supra* note 90. Bronson thereupon became the judge for the Northern District of Florida. See BRONSON FJC BIOGRAPHY, *supra* note 124.

¹⁴⁰ See Act of Feb. 23, 1847, *supra* note 90.

President Polk nominated Marvin to fill the new post on March 2, 1847, and on the following day the U.S. Senate confirmed him and he received his commission.¹⁴¹ The first libel in the new court was filed on April 26, 1847.¹⁴²

VII. CONCLUSION

It is risky to create a history of a time or person from artifacts we locate. We never have the full picture, and we may misinterpret what we find.¹⁴³ Nevertheless, it seems that Marvin did more than decide hundreds of salvage cases over the course of more than 20 years. Those cases, and the rules he promulgated, helped to regulate an industry. His treatise was more than a systematic presentation of the rules of salvage. It provided salvors and their lawyers with guidance in how to try a case.

Marvin's court was efficient. Many cases were resolved within three or four days from the filing of the libel. Marvin also was a scholar who could admit and learn from his mistakes.¹⁴⁴ As it turned out, he lacked the authority to decide salvage cases after Florida became a state and before his appointment to the district court.¹⁴⁵ However, he acted as a judge during that period with honorable motives.¹⁴⁶

Most notably, throughout his judicial career Marvin succeeded in carefully balancing what remains the fundamental challenge in salvage disputes: to encourage others to save as many lives and as much property as possible without discouraging vessels in distress from seeking aid.¹⁴⁷

¹⁴¹ See MARVIN FJC BIOGRAPHY, *supra* note 8.

¹⁴² See *Bethel v. The Rosalie* (S.D. Fla. 1847), 4 Adm. Rec. 1, available at <https://www.fold3.com/image/27369516>.

¹⁴³ For a further examination of these points, see the 1993 Tom Stoppard play *Arcadia*. See also Philip B. Kurland, *Judicial Biography: History, Myth, Literature, Fiction, Potpourri*, 70 N.Y.U. L. REV. 489, 499 (1995).

¹⁴⁴ See *supra* notes 80-81 and accompanying text.

¹⁴⁵ See *supra* text accompanying note 135.

¹⁴⁶ See *supra* text accompanying note 131.

¹⁴⁷ Compare WRECK AND SALVAGE, *supra* note 6, at 213 (“Adequate rewards encourage the tendering and acceptance of salvage services; exorbitant demands discourage their acceptance, and tend to augment the risk and loss of vessels in distress.”), quoting *The Nimrod*, (1850) 7 Notes of Cases in the Eccl. & Mar. Cts. 570, 579 (Adm.) (Eng.) (Lushington, J.), with *Margate Shipping Co.*, 143 F.3d at 986 (“In order properly to induce the salvor (and salvee) to act, however, the law must provide for a proper and reasonable salvage award, one that gives neither the salvor too little incentive to do the salvage properly, nor the salvee too little reason to care if his property is saved.”).

THE CONFEDERATE LAW OF PRIZE

John Paul Jones*

ABSTRACT

This essay describes the prize law of the Confederate States of America. Due to the Union's blockade of the South's coastline, Confederate judges heard very few prize cases. But when they did, they closely hewed to the prize law of the United States.

KEYWORDS

Confederate States of America, Key West, Letters of Marque, Privateering, Prize Law, Ransom Bonds, Reprisals, U.S. Civil War, Union Blockade, William Marvin

CONTENTS

I. INTRODUCTION	338
II. COPYING THE FEDERAL BLUEPRINT	338
III. THE PRIZE LAW OF THE UNITED STATES.....	340
IV. THE PRIZE LAW OF THE CSA	340
V. CONCLUSION.....	344

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I. INTRODUCTION

In this special issue of the *British Journal of American Legal Studies*, Professor Robert M. Jarvis documents the effort of the Confederate States of America (“CSA”) to establish a prize court at Key West.¹ Although this initiative failed, the CSA did have a prize law system.

II. COPYING THE FEDERAL BLUEPRINT

On paper, there was nothing special about the CSA’s prize law system.² It was adopted wholesale from that of the United States, from which the Southern states were attempting to secede. Its constitutional foundations were taken verbatim from the Constitution of the United States, both assigning the power to grant letters of marque to the national legislature³ and explicitly foreclosing member states from issuing their own.⁴ Both constitutions treated as one-and-the-same the sovereign’s power to grant letters of marque and the sovereign’s power to grant reprisals.⁵

¹ See Robert M. Jarvis, *The Confederate Admiralty Court at Key West*, 12 BRIT. J. AM. LEGAL STUD. 227 (2023).

² For very accessible descriptions of the Anglo-American versions of the laws of capture and prize in their heyday, see DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE AGE OF FIGHTING SAIL* (1999); RICHARD HILL, *THE PRIZES OF WAR: THE NAVAL PRIZE SYSTEM IN THE NAPOLEONIC WARS 1793-1815* (1998).

³ Compare CSA CONST., art. I, § 8, cl. 11 with U.S. CONST., art. I, § 8, cl. 11.

⁴ Compare CSA CONST., art. I, § 10, cl. 1 with U.S. CONST., art. I, § 10, cl. 1.

⁵ A letter of marque is one thing; a reprisal is something else altogether. The former is a wartime commission; it licenses what would otherwise be condemned in international law as piracy. The latter was once apt for times of peace, or at least periods of low intensity armed conflict. When granted a reprisal by his or her sovereign, a private citizen was authorized to pursue retribution from a foreigner by whom he or she had been wronged, typically by forceful seizure of property abroad.

The CSA Constitution followed the U.S. Constitution in assigning the power to grant both licenses to their respective Congresses in a single stroke. See Shavana Musa, *Tides and Tribulations: English Prize Law and the Law of Nations in the Seventeenth Century*, 17 J. HIST. INT’L L. 47, 47-48 (2015); Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 222-24, 227-28 (2009); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1701-03 (2009); Arnold D. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 TRANSACTIONS GROTIUS SOC’Y 29, 35-36 (1925).

Separate and apart from the foregoing are “belligerent reprisals,” that is, acts unlawful in time of war by an aggrieved combatant designed to deter future violations of the law of war by the enemy. See Philip Sutter, *The Continuing Role for Belligerent Reprisals*, 13 J. CONFLICT & SECURITY L. 93, 95 (2008); Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 185-87 (2003).

President Jefferson Davis threatened a belligerent reprisal when he warned President Abraham Lincoln that if the crewmembers of the privateer *Savannah* were executed as pirates, he would order the execution of an equal number of Union prisoners of war. See Letter of President Jefferson Davis to President Abraham Lincoln, Richmond, Virginia, July 6, 1861, in 1 MESSAGES AND PAPERS OF THE CONFEDERACY INCLUDING THE DIPLOMATIC CORRESPONDENCE 115-18 (James D. Richardson ed., 1906); 3 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND

The statute that endowed Confederate courts with prize jurisdiction reflected the same presumption that cases of prize were cases of “admiralty and maritime jurisdiction,” as the Supreme Court of the United States had made clear in 1794.⁶

The act of the Confederate Congress delegating the power to issue letters of marque to the Confederate president; regulating privateering; and governing the sale of prizes repeats practically verbatim the antecedent federal statutes on the same subjects.⁷ Section 10 of the same act, offering to the officers and men of any private armed ship a reward for the destruction of an enemy warship, appeared first in the Act of August 2, 1813,⁸ and section 14, discounting import duties on goods captured by private armed ships, appeared first in the Act of August 2, 1813.⁹

Five days after the Confederate Congress established the prize court at Key West, it passed an “Act to provide for the organization of the Navy.” Section 9 of that act adopted all the federal laws pertaining to the U.S. Navy in force at the time.¹⁰ Thus, the federal law assigning most of the sovereign’s claim to prize money to the officers and men of a capturing warship of the U.S. Navy,¹¹ dictating its distribution, and directing the rest to a disability pension fund, also became law for the Confederate Navy.

The general directions to Confederate privateers issued by President Davis were identical to those that had been issued by President James Madison during the War of 1812.¹²

CONFEDERATE ARMIES 5-6 (2d Ser. 1902). See also WILLIAM MORRISON ROBINSON, JR., THE CONFEDERATE PRIVATEERS 133-51 (1928) [hereinafter CONFEDERATE PRIVATEERS].

⁶ “The Judges being decidedly of opinion, that every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court. . . .” *The Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794). By means of a sweeping reception statute (Act of Feb. 9, 1861, ch. 1), “[A]ll the laws of the United States of America, in force and in use in the Confederate States of America on the first day of November [1860], and not inconsistent with the Constitution of the Confederate States, be and the same are hereby continued in force until altered or repealed by the Congress.” Presumably, this made the rule of *The Betsey* the law of the Confederacy.

⁷ Compare Act of May 6, 1861, ch. 3, in 2 THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA, FROM THE INSTITUTION OF THE GOVERNMENT, FEBRUARY 8, 1861, TO ITS TERMINATION, FEBRUARY 18, 1862, INCLUSIVE 100-04 (James M. Matthews ed., 1864) (on letters of marque, prizes, and prize goods), and Act of May 14, 1861, ch. 18, *id.* at 112-13 (on the sale of prizes) with Act of June 26, 1812, ch. 107, 2 Stat. 759, and Act of Jan. 27, 1813, ch. 13, 2 Stat. 792.

⁸ See ch. 55, 3 Stat. 81. These bounties often are confused with prize money. They are earned by destroying a target, not capturing it. They follow engagements with warships, not encounters with merchantmen. They are payable from the national treasury, not from a court’s registry. By its subsequent legislation, the Confederate Congress raised the stakes for private armed ships by promising an additional 20% of the value of any enemy warship destroyed, as assessed by a board of naval officers. See Act of May 21, 1861, ch. 50 (on letters of marque, prizes, and prize goods), in Matthews, *supra* note 7, at 150.

⁹ See ch. 49, 3 Stat. 75.

¹⁰ See Act of Mar. 16, 1861, ch. 58, § 9, in Matthews, *supra* note 7, at 70-75.

¹¹ See Act of Apr. 23, 1800, ch. 6, 2 Stat. 45 (1800).

¹² Compare also President’s Instructions to Private Armed Vessels, in 14 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 285 (1st Ser. 1885) (per CSA Secretary of State Robert A. Toombs) with President’s Instructions to Private Armed Vessels, 15 U.S. (2 Wheat.) 80 (1817) (per U.S. Secretary of State James Monroe).

Counterparts to the 14 standing interrogatories for use in cases of prize before the CSA District Court for the District of Georgia¹³ are to be found among the 32 standing interrogatories for use in such cases in the U.S. District Court for the Southern District of New York.¹⁴

Likewise, counterparts to the 22 rules for use in cases of prize and capture in the CSA District of Georgia¹⁵ are to be found among the 25 rules for use in such case in the U.S. Southern District of New York.¹⁶

III. THE PRIZE LAW OF THE UNITED STATES

At the outbreak of the Civil War, the prize law of the United States was what it had been for 46 years, that is, what it had been at the end of the War of 1812.¹⁷ It (and the prize law of the Confederacy) differed in one important aspect from that shared by many European powers. The prize law common to both American antagonists reserved a sovereign's discretion to grant letters of marque. At a conference held in Paris in 1856, several European powers had agreed to refrain from the future issuing of such letters, thereby withdrawing their endorsement for war at sea by private armed vessels, or "privateers."¹⁸ Many other nations subsequently signed on. Still others renounced the practice without formally becoming a party to the declaration. Among the few holdouts with appreciable stakes in the matter was the United States.

IV. THE PRIZE LAW OF THE CSA

When war broke out, the Union, possessing a considerable fleet of warships, declared a blockade and renounced privateering. The Confederacy, lacking such a fleet, condemned the blockade and recruited privateers. Meanwhile, having forsworn privateers of their own, neutral sovereigns closed their ports to prizes captured by either side.¹⁹ Once the Union blockade became effective, Confederate courts were left with little opportunity to try prize cases,²⁰ stunting development by

¹³ See CONFEDERATE PRIVATEERS, *supra* note 5, at 345.

¹⁴ See 15 U.S. (2 Wheat.) at 81.

¹⁵ See CONFEDERATE PRIVATEERS, *supra* note 5, at 349.

¹⁶ See HENRY WHEATON, A DIGEST OF THE LAW OF MARITIME CAPTURES AND PRIZES 369 (1815).

¹⁷ See GERALD R. POWELL ET AL., CIVIL WAR BLOCKADE RUNNERS: PRIZE CLAIMS, AND THE HISTORICAL RECORD, INCLUDING THE DENBIGH'S COURT DOCUMENTS (2012); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 66 (2007).

¹⁸ See generally JAN MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING (2014); Cooperstein, *supra* note 5, at 244-47; Parrillo, *supra* note 17, at 57-62.

¹⁹ See LEMNITZER, *supra* note 18, at 123. See, e.g., 163 Parl. Deb. HC (3d ser.) (1861), cols. 471-72 (UK) (announcement of British policy by Lord John Russell, Secretary of State for Foreign Affairs).

²⁰ Scant but not nil. The CSA District Court for the Southern District of Georgia entertained four cases of prize. See Ritchie Williams, *Floisam and Jetsam: Admiralty Cases in*

the judiciary of case law peculiar to the Confederacy.²¹

Confederate Georgia, 28 J. MAR. L. & COM. 617 (1997). The CSA District Court for the District of North Carolina dealt with nine libels for condemnation as prizes and one libel for salvage by recapture before Hatteras Inlet was sealed by the Union. See William Morrison Robinson, Jr., *Admiralty in 1861: The Confederate States District Court for the Division of Pamlico of the District of North Carolina*, 17 N.C. HIST. REV. 132, 133-38 (1940). The CSA District Court for the Eastern District of Texas entertained libels for the condemnation of 13 Union vessels seized in Galveston when that port was retaken on January 1, 1863. See Nowlin Randolph, *Judge William Pinckney Hill Aids the Confederate War Effort*, 68 Sw. HIST. Q. 14, 20-21 (1964).

In one case reported on only recently, that of the *Santa Clara*, the CSA District Court for the Southern District of Georgia indulgently condemned a prize notwithstanding the failure of its captors to present witnesses taken from their capture for examination by the prize commissioner, leaving the court with testimony only from the captors. Taking guidance from two decisions by the U.S. Supreme Court and one by Justice Joseph Story while riding circuit at the U.S. Circuit Court for the District of Massachusetts, CSA District Judge Edward J. Harden was persuaded that this dereliction was excused by necessity. See Williams, *supra*, at 622-26.

²¹ On the other side of the blockade, in the Union prize courts, business was booming. “By the end of the war, the Union Navy had captured or destroyed approximately 1,500 Confederate blockade runners.” CHESTER G. HEARN, *GRAY RAIDERS OF THE SEA: HOW EIGHT CONFEDERATE WARSHIPS DESTROYED THE UNION’S HIGH SEAS COMMERCE* 4 (1992). U.S. Attorney Richard Henry Dana, Jr.’s exceptional grasp of prize law attracted Union captors to the U.S. District Court for the District of Massachusetts, and that court’s active prize docket made Judge Peleg Sprague “one of the most respected maritime jurists in the nation.” Jeffrey L. Amestoy, *The Supreme Court Argument that Saved the Union, Richard Henry Dana, Jr. and the Prize Cases*, 35 J. SUP. CT. HIST. 10, 14-15 (2010). “Relying extensively on Dana’s brief and argument, Judge Sprague’s opinion foreshadowed the legal theory that was ultimately to persuade a majority of the Supreme Court that the United States could invoke both belligerent and sovereign power against the Confederacy without a Congressional declaration of war.” *Id.* at 15. See *The Amy Warwick*, 1 F. Cas. 799 (1862) (No. 341), *aff’d sub nom.* *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

In the U.S. District Court for the Southern District of New York, Judge Samuel Betts fashioned “the basis of the great revolutionary prize law which has reached such a height in our own day.” Thomas Baty, *Judge Betts and Prize Law*, 11 TRANSACTIONS GROTIUS SOC. 21, 21 (1925). The leading American treatise on prize law during the Civil War was Francis Henry Upton’s *The Law of Nations Affecting Commerce During War: With a Review of the Jurisdiction, Practice, and Proceedings of Prize Courts* (1862), written in response to a request by Judge Betts. See POWELL, *supra* note 17, at 63-64.

Even in Key West, a Union port in a Confederate state, prize cases dominated the court’s docket. In his autobiography, U.S. District Judge William Marvin recalled:

President [Lincoln] authorized [William H. French] the officer in command of the troops at Key West to declare martial law whenever he thought it best to do so. As soon as the existence of this order was made known, the leading secessionists left the Island and went to the mainland. The Unionists were now in the ascendancy and quiet and good order prevailed. I soon had an immense amount of work to do in deciding Prize cases. The most of the vessels captured for attempting to break the blockade of the Ports in the Gulf of Mexico and at Charleston and Savannah were brought to Key West for adjudication, and I had plenty of work to do up to the time of my resignation in 1863.

Without access to the only courts from which prize money could be won, Southern privateers lost their incentive to hunt Union shipping. Thus, they soon turned to the more lucrative business of running the blockade.²² As privateering ebbed, *guerre de course* (“commerce raiding”) was left to a handful of sea-going cruisers of the CSA Navy.²³

What prize law peculiarities did emerge from Confederate practice may be found in what might be called “captain’s law,” implied by capture decisions of the CSA Navy’s cruisers. Without judicial review ashore, a Confederate captor’s summary judgment on the spot became the final say on the prize’s legality, contrary to the rule then universally observed.²⁴ Error exposed those responsible to personal liability, albeit at some indefinite time and place.

Confederate commerce raiders burned most Union ships caught laden with cargo for Union shippers. They ransomed most Union ships found laden with cargo for neutral shippers, as well as most neutral ships laden with Union cargo (save for that qualifying as contraband).²⁵ A few captures were released as “cartel ships,” which relieved the CSA’s cruisers of mariners and passengers evacuated from earlier captures that had been put to the torch.²⁶

For its release, a ransomed vessel provided a bond. This was a promise in writing by the capture’s master, both personally and on behalf of the ship’s owners,

Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 FLA. HIST. Q. 179, 214 (1958) (footnote omitted).

²² See CRAIG L. SIMONDS, *THE CIVIL WAR AT SEA* 64-65 (2009); JOHN M. COSKI, *THE CONFEDERATE NAVY* 42 (2005); *CONFEDERATE PRIVATEERS*, *supra* note 5, at 249-50. See also John Paul Jones, *Into the Wind: Rhett Butler and the Law of War at Sea*, 31 J. MAR. L. & COM. 633 (2000).

²³ See generally Angus Konstam, *CONFEDERATE RAIDER 1861-1865* (2003); HEARN, *supra* note 21; Mark Mello, “A Compact with the Whales: Confederate Commerce Raiders and New Bedford’s Whaling Industry 1861-1865” (unpublished honors thesis, Bridgewater State University, May 9, 2017), available at http://vc.bridgew.edu/honors_proj/216.

²⁴ See Thomas Baty, *Neglected Fundamentals of Prize Law*, 30 YALE L.J. 34, 38 (1920).

²⁵ These practices conformed to two of the four principles agreed to by parties to the Paris Declaration of 1856. As explained *supra* text following note 18, neither the United States nor the CSA were parties but both belligerents found it expedient to adopt these two trending restraints on *guerre de course*.

Of 237 captures by the Confederate Navy’s nine cruisers, 39 were freed on bond. HEARN, *supra* note 21, at 311-17. The officers of the CSS *Alabama* estimated the total value of the vessels they burned to be \$4,613,914, and the total value of the vessels they bonded to be \$562,250. *Id.* at 316. The officers of the CSS *Shenandoah* estimated the total value of the vessels and cargoes they destroyed to be \$1,172,223, and the total value of the vessels they bonded (save one) to be \$118,600. *Id.* at 317.

²⁶ On December 23, 1862, for example, in the Windward Passage (between the islands of Cuba and Hispaniola), Raphael Semmes, the captain of the CSS *Alabama*, intercepted the SS *Ariel*, a large Union mail steamer en route to the Isthmus of Panama on a war department charter. Once aboard the *Ariel*, the *Alabama*’s boarding party found 500 passengers bound for California, as well as naval officers and 120 U.S. Marines ordered to the U.S. Navy’s Pacific Squadron. With no room aboard his cruiser for so many persons displaced by the *Ariel*’s destruction, Semmes paroled the enemy combatants and took a \$261,000 bond from the *Ariel*’s master before allowing her to proceed on her way. See RAPHAEL SEMMES, *MEMOIRS OF SERVICE AFLOAT DURING THE WAR BETWEEN THE STATES* 532-35 (1996) (1868); SPENCER C. TUCKER, *BLUE & GRAY NAVIES: THE CIVIL WAR AFLOAT* 282 (2006).

to pay a sum of money in the future in exchange for the ship's release and safe conduct. The ship served as collateral. The captor retained the original bill; the capture's master took a copy as evidence of the captor's promise of safe conduct.²⁷ In view of the alternative, the price of release was more or less whatever the capturing captain dictated.²⁸

An action to collect on a ransom bond might be brought *in personam* in a common law court against the capture's master, who would then implead the shipowner.²⁹ But it might also be brought *in rem* in any admiralty court, foreign or domestic,³⁰ provided that the pledged ship was within the reach of the court. Duress was no defense;³¹ indeed, to be enforced by an admiralty court, such bonds had to be necessary for the vessel's voyage to continue.³² The rebellion's suppression left these ransom bonds unenforceable.³³

²⁷ See A. Pearce Higgins, *Submarine Warfare*, 1 BRIT. Y.B. INT'L L. 149, 163 (1920-1921). The bond prescribed a port and a route thereto. Deviation nullified the safe conduct. See William Senior, *Ransom Bills*, 34 L.Q. REV. 49, 50 (1918).

²⁸ See Higgins, *supra* note 27, at 164. Because the practice might tempt British masters to relax the diligence with which they attempted to evade capture, it was outlawed in the time of George III. *Id.* Neither the United States nor the CSA followed suit.

Semmes's bonds, see *supra* note 26, called for payment to be made to the president of the Confederate States within 30 days of the war's end. See, e.g., *Ransom Bond of the U.S. Ship Bethiah Thayer, Captured by the C.S.S. Alabama, March 1, 1863*, in 1 OFFICIAL RECORDS OF THE UNION AND CONFEDERATE NAVIES IN THE WAR OF THE REBELLION 686 (1st Ser. 1894).

²⁹ See Senior, *supra* note 27, at 52-55; Alexander Tabarrok & Alex Nowrasteh, *Privateers! Their History and Future*, 2 FLETCHER SECURITY REV. 55, 56-57 (2015).

³⁰ See Tabarrok & Nowrasteh, *supra* note 29, at 57. Thirty of the captures burned by the CSA cruisers *Alabama*, *Shenandoah*, and *Sumter* were whaling ships out of New Bedford, Massachusetts. See Mello, *supra* note 23, at 33. Whalers were poor candidates for bonding because they visited foreign ports infrequently and unpredictably. Union whalers, therefore, were practically judgment proof.

³¹ See PETRIE, *supra* note 2, at 18-20; Tabarrok & Nowrasteh, *supra* note 29, at 55, 56.

³² See George F. Steckley, *Bottomry Bonds in the Seventeenth-Century Admiralty Court*, 45 AM. J. LEGAL HIST. 256, 259-60 (2001); R.G. Marsden, *Two Points of Admiralty Law*, 2 L.Q. REV. 357, 363 (1886).

³³ See Jonathan Spencer, *Hull Insurance and General Average—Some Current Issues*, 83 TUL. L. REV. 1227, 1263 (2009).

Regarding the \$261,000 ransom bond extracted by Semmes, see *supra* note 26, the owners of the *Ariel* declared general average and sought contribution. Adjustors apportioned both the bond and the expenses of its adjustment, taking security from one "Hyneman" among other cargo owners. The bond itself was never enforced, but before the Court of Commissioners of Alabama Claims Hyneman challenged the \$78.73 he had paid for the adjustment expenses. The commissioners ruled that the bond was adjustable as general average, validating the adjustment expense charge. See 2 ROB MERKIN, MARINE INSURANCE: A LEGAL HISTORY ¶ 13-141, at 491-92 (2021); FRANK W. HACKETT, GENEVA AWARD ACTS: WITH NOTES, AND REFERENCES TO DECISIONS OF THE COURT OF COMMISSIONERS OF ALABAMA CLAIMS 31-32 (1882); U.S. DEP'T OF STATE, REPORT FROM THE SECRETARY OF STATE, WITH ACCOMPANYING PAPERS, RELATING TO THE COURT OF COMMISSIONERS OF ALABAMA CLAIMS 45 (1877); *Decision in the Case of the Ariel Steamer Boarded by the Alabama*, N.Y. TIMES, Mar. 20, 1875, at 10. For the establishment, structure, and composition of the Court of Commissioners, see MERKIN, *supra*, ¶ 13-130, at 485 (discussing the Act of June 23, 1874, ch. 459, 18 Stat. 245).

V. CONCLUSION

Sensibly derivative but virtually stillborn, the Confederate law of prize nevertheless contributed to the strategic success of the Confederacy's *guerre de course*. It supplied the rules of engagement. The global threat from ranging privateers and cruisers it governed squeezed the market for marine insurance everywhere and directed shippers to neutral hulls, all too often permanently.³⁴ But it could not secure the South's secession.

³⁴ See SIMONDS, *supra* note 22, at 84-85; TUCKER, *supra* note 26, at 295.

“KEEPING TABS”: SPANISH CONSULAR ACTIVITIES IN KEY WEST, 1829-70

Sean T. Perrone*

ABSTRACT

This essay describes the work of Spain’s consuls in Key West between 1829 and 1870. Although Spain sold Florida to the United States in 1821, it retained a keen interest in Key West (primarily due to the city’s proximity to Cuba). As their country’s “eyes and ears,” Spain’s consuls were expected to keep their superiors in Madrid briefed on the latest developments, a task they pursued with vigor.

KEYWORDS

Consuls, Criminals, Cuba, Filibusters, Immigration, International Diplomacy, International Law, Key West, Privateering, Slavery, Spain, William Marvin, Wrecks and Wrecking

CONTENTS

I. INTRODUCTION	346
II. CONSULAR DUTIES	347
A. Wrecks	347
B. Filibusters and Privateers	348
C. Immigrants	350
D. Deserters and Fugitives.....	351
E. Criminals	352
III. IDENTITIES OF THE CONSULS	353
IV. VALUE OF THE KEY WEST CONSULATE.....	354
V. CONCLUSION.....	356

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I. INTRODUCTION

In July 1821, two years after the signing of the Adam-Onís Treaty,¹ Spain finally transferred Florida to the United States. In response, many Spanish landowners began selling their property to Americans. One such owner was Juan Pablo Salas, who sold “Cayo Hueso” (Bone Island) to John W. Simonton for \$2,000 in December 1821.² Within a decade, the island, by now renamed “Key West,” had grown into an important commercial and strategic center with a U.S. custom house (1823), a U.S. naval base (1823), and a U.S. superior court (1828).

The significance of these developments was not lost on Spanish officials. As a result, in 1829 Spain opened a consulate in Key West. During the next 41 years, its consuls—seven in all—served as the country’s eyes and ears in the rowdy frontier town.³

Even when they were not directly involved in local matters, Spain’s consuls regularly sent reports about them to their superiors. These missives add to our understanding of the 19th century history of Key West and provide important insights into diplomatic practices outside national capitals. The consuls also were part of Key West’s daily milieu. In fact, they could not perform their duties without regular interaction with the city’s residents.⁴ By highlighting the activities of these

¹ See Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Feb. 22, 1819, 8 Stat. 252.

² For the sale’s details, see Rembert W. Patrick (ed.), *William Adee Whitehead’s Description of Key West*, 12 TEQUESTA 61, 63 (1952).

³ Spain’s first seven consuls in Key West were:

1829-42: John Notlit (also spelled Notliss)
1842-51: Fielding A. Browne
1852-54: Eusebio J. Gómez
1854-58: José María Salas y Quiroga
1858-59: Hipólito de Uriarte
1859-60: Mariano Alvarez
1860-66: Vicente Cubells

Cubells appears to have left Key West prior to the outbreak of the Civil War. In his stead, Fernando J. Moreno served as interim consul. Spain did not send a new consul to Key West until 1870, when Enrique Aniz was appointed to the position. See CONSUELO E. STEBBINS, *CITY OF INTRIGUE, NEST OF REVOLUTION: A DOCUMENTARY HISTORY OF KEY WEST IN THE NINETEENTH CENTURY XXI* (2007).

Today, Spain’s consulate in Florida is in Coral Gables, just outside Miami. See FLORIDA DEPARTMENT OF STATE—OFFICE OF INTERNATIONAL AFFAIRS, *Directory of Consulates, Bi-National Chambers and Sister Cities in Florida* 13 (June 2022), available at <https://files.floridados.gov/media/705775/directory-of-consulates-bi-national-chambers-and-sister-cities-in-fl-updated-june-2022.pdf>. In August 2022, however, Spain authorized the creation of an “honorary consular office” in Key West, thereby marking a return to the city after an absence of more than 80 years. See *13926 Orden AUC/809/2022, de 12 de Agosto*, at Artículo 2 (“Creación de la Oficina Consular Honoraria de España en San Carlos (Cayo Hueso)”), published in 200 BOLETÍN OFICIAL DEL ESTADO, 20 Aug. 2022, at 119774 (Section 1), available at <https://www.boe.es/boe/dias/2022/08/20/pdfs/BOE-A-2022-13926.pdf>.

⁴ See generally James W. Cortada, *The Information Ecosystem of National Diplomacy: The Case of Spain, 1815-1936*, 48 INFO. & CULTURE: J. HIST. 222 (2013).

relatively anonymous historical figures, this essay provides further context for the three articles by Professor Robert M. Jarvis that headline this special issue of the *British Journal of American Legal Studies*.

II. CONSULAR DUTIES

Spain's consuls were (out of necessity) highly versatile. They dealt with myriad issues, including, most notably, contraband goods, criminal cases, filibusters and privateers, slave ships, and wrecks. The locations of their postings often dictated the direction of their activities.⁵

A. WRECKS

Over the course of the 19th century, Key West stretched Spain's consuls to their limits. In the beginning, consular activity focused on wrecks. Salvage was the principal business in Key West for nearly 40 years (1822-60). Prior to the establishment of Key West, most salvors in the Florida Straits were stationed in Havana or Nassau. Key West's location, however, was ideal for salvage operators. The world of the wreckers was rough-and-tumble, which helps explain Key West's frontier spirit, but it also was a legitimate and profitable business. By the 1830s, Key West's salvage crews were annually recovering approximately \$500,000 worth of goods, the equivalent today of \$13.5 million.⁶

Salvage cases, of course, required agents on the ground to represent the owners, especially as shipwrecked captains and crews often could not make all the arrangements themselves. The growth of the salvage industry led the U.S. government to establish a superior court on the island in 1828 because the existing courts—in Pensacola and St. Augustine—simply were too far away to properly regulate the industry.⁷ The creation of a more formal judicial system in Key West, along with the proliferation of wrecks, led many countries, including Spain, to name consular agents in the city.

Consular agents negotiated settlements with wreckers, hired lawyers, and assisted the crew. In September 1852, for example, consul Eusebio J. Gómez took charge of the Spanish schooner *Adelaide*, which had been damaged in a hurricane, until instructions could be received from its owners in Havana.⁸ They also prepared reports on the salvage industry. In 1857, consul José María Salas y Quiroga noted that there had been 56 shipwrecks on the Florida reefs during the year with "an

⁵ For an overview of Spain's consular service in 19th century America, see Sean T. Perrone, *The Role of Spanish Consuls in the United States, 1795-1898*, in *NATION AND CONFLICT IN MODERN SPAIN: ESSAYS IN HONOR OF STANLEY G. PAYNE* 81 (Brian D. Bunk et al. eds., 2008).

⁶ See S. Morgan Friedman, *The Inflation Calculator*, at <https://westegg.com/inflation/> (converting past dollars to present-day dollars). For more on wrecking and its norms, see MAUREEN OGLE, *KEY WEST: HISTORY OF AN ISLAND OF DREAMS* 11-12, 31-32 (2003); *Key West and Salvage in 1850*, 8 FLA. HIST. Q. 47 (1929).

⁷ See OGLE, *supra* note 6, at 34; *Key West*, NILES' WKLY. REG. (Balt.), May 13, 1826, at 186.

⁸ See *Key West*, N.Y. DAILY TIMES, Sept. 13, 1852, at 1.

estimate[d] value of \$2,662,450, and the salvage costs were approximately \$173,000. Of the 56 vessels, only 12 were . . . settled in court.”⁹

Resolving disputes extra-judicially often proved preferable. In 1856, for example, after the Spanish ship *Rosita* ran aground, its captain agreed to pay \$6,000 to the wreckers. Salas y Quiroga considered this to be a wise decision, because going to court would have resulted in the owners paying more than \$6,000 based on the value of the salvaged cargo.

Possessing greater knowledge about local circumstances (such as salvage awards), Spain’s consuls often were able to provide advice regarding the best course of action. This was especially important when Spanish captains or merchants had no contacts in Key West. Plus, consuls prepared reports on lighthouses and other navigational aids that assisted Spanish mariners plying the dangerous waters of the Florida Straits.¹⁰

On occasion, the consuls’ reports found a wider audience. In 1852, for example, Gómez prepared a table titled “Vessels Wrecked on the Florida Coast, 1844-1851.” This apparently was the first of what Gómez anticipated would be yearly updates. Gómez’s table subsequently was published in various American periodicals.¹¹ Gómez also wrote the editors of the *New Orleans Bee* about ships damaged in a gale in August 1852. Other newspapers in the United States quickly reprinted his bulletin.¹² Thus, consuls were a valuable source of information for people with financial interests in specific vessels as well as those seeking general news about the shipping industry.

B. FILIBUSTERS AND PRIVATEERS

Consuls also kept tabs on filibusters and privateers operating from American shores.¹³ This was especially important in Key West, which quickly became a center for both types of activities. After his stint as U.S. naval commander at Key West (1823-24), for example, Commodore David Porter returned to the port in 1827 in command of the Mexican Navy. Given that Key West did not yet have a federal court or marshal, Porter was able to operate freely, thanks in large part to conniving local officials who readily purchased prize goods from him (in contravention of U.S. neutrality laws). After Spain lodged a formal protest in May 1827, Commodore Charles G. Ridgley was ordered to investigate the situation. Ridgley acquitted Porter of all alleged violations. However, now under greater scrutiny by the government and the press, Porter ordered his squadron to leave the city at the end of August 1827.¹⁴

⁹ STEBBINS, *supra* note 3, at 13.

¹⁰ *Id.* at 3, 11-12.

¹¹ *See, e.g.*, 14 DE BOW’S REVIEW AND INDUSTRIAL RESOURCES, STATISTICS, ETC. 402 (J.D.B. De Bow ed., 1853).

¹² *See, e.g.*, *Key West—The Wrecks*, N.Y. DAILY TIMES, Sept. 22, 1852, at 3.

¹³ A filibuster is a person who seeks to invade and revolutionize a foreign country in disregard of international law. *See* BLACK’S LAW DICTIONARY 773 (Bryan A. Garner ed., 11th ed. 2019). In contrast, a privateer is a person who has been authorized (through the issuing of a letter of marque) to disrupt the maritime commerce of a hostile foreign nation. *Id.* at 1448. In 1856, at the insistence of France and Great Britain, privateering was outlawed by the Paris Declaration. *See* C.I. Hamilton, *Anglo-French Seapower and the Declaration of Paris*, 4 INT’L HIST. REV. 166 (1982).

¹⁴ *See* OGLE, *supra* note 6, at 14-21; T. Frederick Davis, *Pioneer Florida*, 25 FLA. HIST. Q.

Porter, of course, was not the only opportunist who recognized the advantages of operating out of Key West to attack Spanish possessions and shipping. But his activities were a catalyst for Spain’s decision to place a consular agent in Key West.

Although the outfitting of privateers from American shores was waning by the 1830s, the outfitting of filibusters was on the rise. Probably the most famous early filibuster was Narciso López, who skillfully manipulated the annexationist fervor in the United States as part of his plan to wrest Cuba from Spain and have it join the union as a slave state.

In 1850, López sailed to Cuba from New Orleans with roughly 500 men. After capturing the Cuban town of Cardenas on May 19, López soon was forced to retreat. His ship, the *Creole*, pursued by the Spanish frigate *Pizarro*, headed for Key West. Flying the American flag, the *Creole* entered the city’s port; the *Pizarro*, now within the range of the cannons at Fort Zachary Taylor, retreated. Although Key West’s residents welcomed López and his men as heroes, U.S. Marshal Walter C. Maloney immediately seized López’s ship as well as its weapons and ammunition. Maloney also detained several slaves, who had stowed away on the *Creole*, and wrote to Washington seeking advice as to what should be done with them.

In the meantime, Fielding A. Browne, Spain’s consul, petitioned Key West’s federal court for possession of the slaves. U.S. District Judge William Marvin ordered Maloney to surrender the slaves to Browne and instructed Browne to return them to their Cuban owners. Browne’s actions might seem dubious to us today, but they underscore consular efforts to protect Spanish “property” and achieve larger policy goals through the courts.¹⁵

While many of his troops were set free, López and the expedition’s other leaders were indicted by a New Orleans grand jury for violations of the Neutrality Act of 1818. The government, however, failed to win a conviction.¹⁶ Clearly, popular sentiment favored the filibusters.

A year later, in 1851, López again sailed to Cuba and stopped at Key West along the way. This time, thanks in part to intelligence provide by Browne, Spanish officials in Cuba captured and executed López. On learning of his death, Americans in Key West, Mobile, and New Orleans attacked consular offices as well as Spanish residents and property. The intervention of the Spanish vice-consul in Mobile likely saved 67 Spanish sailors, who had been shipwrecked there, from being lynched. The Spanish minister immediately filed a complaint with the U.S. government.¹⁷ In response, Congress passed various resolutions to compensate Spaniards for their

64 (1946); *Mexican Squadron at Key West*, NILES’ WKLY. REG. (Balt.), Sept. 8, 1827, at 23.

¹⁵ For more on the effort to use legal cases to achieve diplomatic ends, see Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816-1822*, 30 L. & HIST. REV. 245 (2012); Sean T. Perrone, *John Stoughton and the Divina Pastora Prize Case, 1816-1819*, 28 J. EARLY REPUBLIC 215 (2008).

¹⁶ See INDEX TO EXECUTIVE DOCUMENTS PRINTED BY ORDER OF THE SENATE OF THE UNITED STATES DURING THE FIRST SESSION OF THE THIRTY-FIRST CONGRESS 1849-50, at 129-34 (1850); Lester D. Langley, *The Whigs and the López Expedition to Cuba, 1849-1851: A Chapter in Frustrating Diplomacy*, 71 REVISTA DE HISTORIA DE AMERICA 9, 14-15 (1971).

¹⁷ See FRENCH ENSOR CHADWICK, THE RELATIONS OF THE UNITED STATES AND SPAIN: DIPLOMACY 239-40 (1909); *Piratical Expeditions Against Cuba*, 6 BROWNSON’S Q. REV. 66 (1852).

losses in Key West and New Orleans. The total amount appropriated was \$22,450,¹⁸ the equivalent today of \$700,000.¹⁹

Tensions remained high throughout the 1850s.²⁰ In 1857, for example, General José V. Miñón began organizing a filibustering expedition in Key West aimed at fomenting a rebellion in Mexico. Salas y Quiroga reported happily when Miñón failed to raise sufficient funds for his expedition and left Key West.²¹

Salas y Quiroga's good news was short lived, however, for Key West remained a center of filibustering and anti-Spanish sentiment for the rest of the century. In the later part of the 19th century, consuls regularly spied on, and reported on, Cuban activities in the city. In 1871, for example, the Spanish consul in Key West disrupted a plan to launch a small expedition by reporting it to local officials. In retaliation, an angry mob stoned his house.²²

In the 1880s, the Spanish consuls in Key West tirelessly worked to prevent filibuster expeditions from setting sail but faced a hostile public and indifferent officials at the custom house. In 1884, a mob threatened the consul with violence; Secretary of the Treasury Charles J. Folger ordered his agent in Key West (Ethelbert Hubbs) to work with the city's naval authorities to protect the life and property of the consul.²³ In 1885, Frank Wicker, Key West's customs collector, was removed from office after a formal Spanish protest over "his participation in pro-Cuban demonstrations."²⁴ In 1890, the Spanish consul left Key West because the Cuban refugees there threatened his life.²⁵ His public departure may have prompted federal officials to act, because a new consul soon arrived and immediately resumed tracking down filibusters.

The foregoing examples go beyond the period of study of the present essay. Still, the problems with monitoring and preventing filibustering expeditions were all present in the first half of the century. They became more serious threats, and a larger part of the consuls' responsibilities, after the Civil War.²⁶

C. IMMIGRANTS

By the mid-19th century, Key West was a cosmopolitan city inhabited by, among others, Americans, Bahamians, Cubans, and Spaniards. The first Cuban tobacco

¹⁸ See Letter [dated December 6, 1854] of the Secretary of the Treasurer Transmitting Estimates of Appropriations Required for the Service of the Fiscal Year Ending June 30, 1856, in 3 EXECUTIVE DOCUMENTS DURING THE SECOND SESSION OF THE THIRTY-THIRD CONGRESS 66 (1855).

¹⁹ See Friedman, *supra* note 6.

²⁰ See James W. Cortada, *The United States, in SPAIN IN THE NINETEENTH-CENTURY WORLD: ESSAYS ON SPANISH DIPLOMACY, 1789-1898*, at 131, 135 (James W. Cortada ed., 1994).

²¹ See STEBBINS, *supra* note 3, at 215.

²² See Gerald E. Poyo, *Key West and the Cuban Ten Year War*, 57 FLA. HIST. Q. 289, 296 (1979).

²³ See *The Schooner Shoters Seized*, N.Y. TIMES, Apr. 7, 1884, at 1; *A Spanish Consul Threatened*, N.Y. TIMES, May 17, 1884, at 2.

²⁴ See Gerald E. Poyo, *Cuban Patriots in Key West, 1878-1886: Guardians at the Separatist Ideal*, 61 FLA. HIST. Q. 20, 28 (1982).

²⁵ See *A Very Excitable Consul*, N.Y. TIMES, Nov. 3, 1890, at 1.

²⁶ See STEBBINS, *supra* note 3, at 232.

workers arrived in 1831. As the cigar industry grew, more immigrants arrived from Cuba and Spain.²⁷ The consuls in Key West consequently began monitoring the growing number of Spanish subjects residing in the city. In 1852, for example, Gómez announced that “all Spanish citizens and subjects who have been or who henceforth may be in [the United States for] four months [are required] to . . . have a registry made of their names under the penalty of being declared non-subjects of the Queen of Spain.”²⁸

Monitoring the activities of tobacco workers and others was especially important as many immigrants favored independence for Cuba. In fact, by the 1870s, Key West was a principal center for financial and political support for Cuban independence. American sentiment also became more anti-Spanish, and this occasionally put the consuls in danger, especially as more Americans, including naturalized Cubans, were arrested by Spain in questionable circumstances.²⁹

D. DESERTERS AND FUGITIVES

In addition to watching legitimate immigrants, consuls also kept an eye out for deserters and fugitives fleeing from Spanish colonies or ships. In April 1857, for example, Manuel de Castro deserted the Spanish vessel *San Juan Baptista* in Key West. The ship’s captain immediately asked the local authorities to detain Castro but then weighed anchor and left the port. Salas y Quiroga, as Spain’s local representative, followed up on the case and asked Judge Thomas F. King of the Monroe County circuit court to hand Castro over so that he could be tried in a Spanish court. Salas y Quiroga based his argument on the consular regulations existing between France and the United States regarding the arrest of deserters. Salas y Quiroga also noted that the Spanish government “collaborates with the U.S. consuls abroad for the arrest of any deserter.”³⁰ Clearly, Salas y Quiroga expected reciprocity.

Stephen R. Mallory, Castro’s attorney, eviscerated Salas y Quiroga’s argument. Mallory began by pointing out that Salas y Quiroga had provided “no references to how Spanish deserters should be handled in the United States.”³¹ Mallory also insisted “that the favored nation status only applies to certain privileges and did not pertain to this case.”³² King found Mallory’s arguments persuasive and set Castro free.

In a letter to his superiors, Salas y Quiroga expressed reluctance to appeal the case to Marvin,³³ who “is not a supporter of Spain either, so I would end up paying

²⁷ See OGLE, *supra* note 6, at 85-87.

²⁸ *A Spanish Pronunciamento*, N.Y. DAILY TIMES, May 10, 1852, at 3.

²⁹ For a history of Cuban patriots in Key West, see ALEJANDRO F. PASCUAL, *KEY WEST: PASSION FOR CUBA’S LIBERTY* (2013).

³⁰ STEBBINS, *supra* note 3, at 165.

³¹ *Id.*

³² *Id.*

³³ In 1842, Congress had authorized the appeal of state *habeas corpus* decisions to the federal district courts “in all cases [involving] any prisoner or prisoners . . . where he, she, or they, [are] subjects or citizens of a foreign state, and domiciled therein . . . [and] the validity and effect [of the arrest] . . . depend upon the law of nations, or [is done] under color thereof. . . .” Act of Aug. 29, 1842, 5 Stat. 539-40.

more in court costs.”³⁴ When Salas y Quiroga eventually did decide to appeal the case, Marvin dismissed it. Matters were not finished, however, for the Spanish minister in Washington subsequently lodged a complaint with Secretary of State Lewis Cass. In turn, Cass sought an opinion from Attorney General Jeremiah S. Black.

In September 1857, Black advised Cass that “the apprehension and delivery of a deserter is a judicial duty.”³⁵ He quickly added, however, that Article XIII of the Adam-Onís treaty required Salas y Quiroga to “*exhibit* the ship’s roll, and the name of the deserter must *appear* in it before he can be arrested. . . .”³⁶ In Castro’s case, Salas y Quiroga had produced only an extract from the roll certified by himself—not the original roll as the treaty required. Consequently, although King and Marvin may have erred in their interpretations of the law, Black concluded that their “decision was right.”³⁷

Salas y Quiroga’s failure to repatriate Castro underscores the costs and difficulties of pursuing such cases. It also reminds us that obscure local controversies can have potentially enormous ramifications at the national and international level. Lastly, it points out the necessity of carefully following the words of a treaty.

A few years later, in 1859, consul Mariano Alvarez had more success capturing and repatriating a runaway slave named Regino González Toledo. After obtaining the proper documentation from Cuba, Alvarez paid for González Toledo’s passage back to Cuba.³⁸ Without Alvarez’s efforts, it is unlikely that González Toledo would have been returned to his owner.

Of course, consuls could not intercept every deserter and fugitive. As Jarvis reports in his third article, in 1870 Ensign Elias Moscoso deserted the Spanish Navy after embezzling \$18,000. He then headed to Key West, where he married Dr. Daniel W. Whitehurst’s daughter Kate.³⁹

E. CRIMINALS

Consular agents also monitored criminal activities by Spanish subjects. As Jarvis explains in his first article, in the 1859 *Enterprise* mutiny-murder case, Alvarez did not play an active role in the proceedings. He did, however, send two reports about the incident to his superiors, the latter of which bluntly (and correctly) predicted, “The two Spanish sailors [Carcer and Ortega] who were implicated in the crime are in jail here, and one will probably be hanged.”⁴⁰

At other times, however, consuls and ministry officials did become involved in criminal cases. In 1812, for example, a Spanish citizen was sentenced to two years

³⁴ STEBBINS, *supra* note 3, at 166.

³⁵ ELLERY C. STOWELL, CONSULAR CASES AND OPINIONS FROM THE DECISIONS OF THE ENGLISH AND AMERICAN COURTS AND THE OPINIONS OF THE ATTORNEYS GENERAL 586 (1909).

³⁶ *Id.* (emphasis in original).

³⁷ STOWELL, *supra* note 35, at 586.

³⁸ See STEBBINS, *supra* note 3, at 30. Consuls were involved in extradition cases throughout the 19th century.

³⁹ See Robert M. Jarvis, *A Key West “Jack-of-All-Trades”: The Strange Life, and Peculiar Death, of Dr. Daniel W. Whitehurst*, 12 BRIT. J. AM. LEGAL STUD. 255, 289-90 (2023).

⁴⁰ See Robert M. Jarvis, *The Schooner ENTERPRISE: A Forgotten Key West Murder Case*, 12 BRIT. J. AM. LEGAL STUD. 195, 212 (2023).

in prison for an assault in Philadelphia; minister Luis de Onís obtained a pardon for him on the condition that the man be put on board the first boat to Puerto Rico.⁴¹

In 1823, Thomas Stoughton, Spain’s consul in New York, advised the court that Josef Perez, who was on trial for piracy, had been misidentified, thereby lending support to the argument being advanced by Perez’s attorneys. The case ended in a hung jury. At his second trial, Perez was found guilty and sentenced to death. Just before his execution, Perez was pardoned by President James Monroe. One can only assume that Spain’s minister intervened with the U.S. government to save Perez’s life.⁴²

Nearly a decade later, the Spanish consul at Charleston and the Spanish legation in Washington took a very active role in the trial of accused murderer Luis Lliso.⁴³ Their efforts were unsuccessful, however, and Lliso was executed.⁴⁴

Similar diplomatic maneuvering undoubtedly occurred on many occasions. Thus, if we look more closely at these forgotten criminal cases, we will certainly gain new insights into the application of U.S. laws to foreign citizens and Spain’s efforts to influence the outcome of U.S. prosecutions.

III. IDENTITIES OF THE CONSULS

So just who were the consuls? Spain’s first consul in Key West was John Notlit (also spelled “Notliss”).⁴⁵ Its second consul was Browne. Both were Americans. While we know nothing about Notlit/Notliss, Browne was a “large land owner and prominent business man.”⁴⁶ In 1852, Gómez became the first Spaniard to be appointed to the position of Key West consul.

In 1860, following the tenures of Salas y Quiroga, Hipólito de Uriarte, and Alvarez, Vicente Cubells became Spain’s seventh Key West consul. When the Civil War broke out, he apparently left the city but retained his title (the documentary record is open to interpretation). In his stead, Fernando J. Moreno, a native of Pensacola and a former mayor of Key West, served as Spain’s interim consul.⁴⁷

⁴¹ See Archivo Historico Nacional [hereafter AHN], Estado, leg. 5638 (Jan. 26, 1812).

⁴² For more about the case, see A CORRECT REPORT OF THE TRIAL OF JOSEF PEREZ FOR PIRACY, COMMITTED ON BOARD THE SCHOONER BEE, OF CHARLESTON, S.C. BEFORE THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK ON TUESDAY, SEPT. 9TH, 1823 (1823); *Executions*, ZION’S HERALD (Bos.), May 12, 1824, at 3; *Pirate Pardoned*, COLUMBIAN STAR (DC), June 12, 1824, at 2.

⁴³ See Duke University [hereinafter DU], *Spanish Consulate, Charleston, S.C. Papers*, Box 4, Folder 1837-1839, May 12, 1837, June 5, 12, 13, 16, 21, 1837; Jan. 26, Mar. 22, May 28, June 24, and Sept. 28, 1838, at <https://archives.lib.duke.edu/catalog/spanishconsulate>.

⁴⁴ See *Execution*, MORN. HERALD (NY), June 15, 1838, at 3.

⁴⁵ The published lists of foreign agents in the United States indicate that a “John Notlit” was Spain’s consul in Key West from 1829 to 1834, while a “John Notliss” held the post from 1834 to 1842. Clearly, however, this is the same person. See 7 PETER FORCE, THE NATIONAL CALENDAR FOR MDCCCXXIX, at 241 (1829); DU, *supra* note 43, at Box 4, Folder 1840-1844 (“Circular Letter from Consul General Chacon, Nov. 14, 1840”).

⁴⁶ 1 HISTORY OF FLORIDA: PAST AND PRESENT 422 (Harry Gardner Cutler ed., 1923).

⁴⁷ See *supra* note 3 (explaining that after Cubells’s tenure ended in 1866, Spain did not appoint a new consul in Key West until 1870).

We do not know much about Moreno's efforts. We do know, however, that Moreno also was appointed by the Confederate States of America ("CSA") to be the marshal of its new Court of Admiralty and Maritime Jurisdiction at Key West.⁴⁸

Overall, roughly one-third of Spain's consular agents in the United States between 1795 and 1860 were foreigners.⁴⁹ Over time, however, appointments to the consulate in Key West came mainly from career consuls, indicating the growing importance of the post. Two of these agents—Uriarte and Alvarez—both moved up the ranks to more important positions. Uriarte, for example, served as Spain's consul general to the United States from 1874 to 1883.⁵⁰ Alvarez left Key West in 1859 to become the consul general and chargé d'affaires at Santo Domingo.⁵¹

Alvarez's warm relations with Moreno and other prominent citizens in Key West, coupled with his sympathy for the South's cause, led Manuel D. Crugat, an important figure in Cuban political circles, to float Alvarez's name with Mallory—who by this time had become the CSA's Secretary of the Navy—as a potential Spanish minister to the Confederacy.⁵² Although nothing came of this suggestion, it demonstrates that despite the animosity many Key Westers had towards the Spanish consuls, the consuls (whether Americans or Spaniards) managed to build important friendships and social networks.

IV. VALUE OF THE KEY WEST CONSULATE

Although its consuls in Key West became enmeshed in local society and provided useful information, the Spanish government was not one hundred percent sold on the post's value. In November 1853, for example, the Spanish secretary of state asked Juan de la Pezuela, the captain general of Cuba, to: 1) appraise the value of the post; 2) rate the performance of the current consul (Gómez); and 3) make recommendations as to who might fill the position in the future. In March 1854, de la Pezuela sent his assessment to Madrid.

First and foremost, de la Pezuela recommended keeping the consulate open. He explained that if the consulate's only responsibility was supervising commercial relations, which consisted primarily of small ships trading fresh produce, it could be closed. However, he continued, the strategic location of Key West in relation to Cuba, and the danger of adventurers operating out of the sparsely populated

⁴⁸ See STEBBINS, *supra* note 3, at 54; Robert M. Jarvis, *The Confederate Admiralty Court at Key West*, 12 BRIT. J. AM. LEGAL STUD. 227, 237 (2023); U.S. CENSUS BUREAU, *Fernando Joaquin Moreno: Floridian Businessman, Politician, Marshal*, at http://census.gov/history/pdf/fernando_moreno.pdf.

⁴⁹ See Sean T. Perrone, *The Formation of the Spanish Consular Service in the United States (1795-1860)*, in CONSULS ET SERVICES CONSULAIRES AU XIXE SIÈCLE: DIE WELT DER KONSULATE IM 19. JAHRHUNDERT [CONSULSHIP IN THE 19TH CENTURY] 203, 208-10 (Jörg Ulbert & Lukian Prijac eds., 2010) [hereinafter *Formation*].

⁵⁰ See *de Uriarte Died at Fire Escape*, N.Y. TIMES, Aug. 30, 1913, at 5 (reporting on Uriarte's career following his death in a house fire).

⁵¹ See *Personal Intelligence*, N.Y. HERALD, Nov. 15, 1859, at 1.

⁵² See *Letter from Manuel D. Crugat to Stephen R. Mallory (Mar. 24, 1861)*, reprinted in 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE CONFEDERACY, INCLUDING THE DIPLOMATIC CORRESPONDENCE, 1861-1865, at 11-12 (1905).

archipelago, necessitated a presence in the region. In fact, de la Pezuela proposed enlarging the consulate’s jurisdiction to include all the Florida Keys rather than just Key West. De la Pezuela likely made this suggestion because Narciso López’s 1850 filibustering expedition was still fresh in his mind.

De la Pezuela also recommended that the consul’s salary be increased to 2,000 pesos a year, the equivalent today of approximately \$60,000.⁵³ In defending this number, de la Pezuela pointed out that Gómez had just resigned because he could not live on the miserly salary currently being paid.⁵⁴

De la Pezuela’s opinion on Gómez’s service was mixed, but given that Gómez already had submitted his resignation, de la Pezuela went ahead and recommended José López Arigo as Spain’s next consul.⁵⁵

As previously explained, Key West was an important listening post in the United States. Thus, the fact that the Spanish government even discussed closing the office highlights the ongoing debates in Madrid about the best way to watch over Spanish interests in the United States. In the end, the crown decided to keep the consulate open and appointed Salas y Quiroga as Gómez’s replacement.⁵⁶

Debates about opening or closing consulates often were tied to remuneration. The Spanish crown struggled to pay its consuls in the early 19th century. In fact, until mid-century, the consuls in Key West derived much of their income from the collection of import-export taxes at the city’s “Spanish wharf,” as well as the issuing of manifests for ships heading to Cuba.⁵⁷ Any changes in policy or fluctuations in trade therefore could negatively affect the consuls.

To help make ends meet, some consuls served multiple countries despite official disapproval by the Spanish government.⁵⁸ For example, in 1853, a year after being appointed Spain’s consul in Key West, Gómez was appointed Guatemala’s consul in the city. Gómez apparently served several countries. In an 1854 listing of foreign consuls in the United States, the consular agent for Costa Rica in Key West was E.J. Gómez; for Guatemala, E.J. Gómez; for Sardinia, E. José Gómez; and for Spain, Eusebio J. Gómez.⁵⁹ Undoubtedly, none of these offices generated large commissions because, as just seen, Gómez resigned as Spain’s consul in 1854 due to his meager salary.

In addition to Spain, Moreno served at various points as the vice-consul for France, Germany, and Great Britain. Again, it was relatively common for consular agents to serve multiple countries. Because commissions constituted a large share of a consul’s income, the more countries one could represent, the greater the likelihood of earning money through commissions. Yet such service did not mean

⁵³ See *Six Ways to Compute the Relative Value of a Spanish Peseta (or Euro) Amount, 1850–Present*, MEASURING WORTH.COM, at <https://www.measuringworth.com/calculators/spaincompare/>.

⁵⁴ Unfortunately, de la Pezuela’s report does not give Gómez’s salary.

⁵⁵ See AHN, *supra* note 41, at Ultramar 31, Exp. 34.

⁵⁶ It is not known why de la Pezuela’s recommendation that Arigo become the new consul was not heeded. Salas y Quiroga died unexpectedly in 1858 (likely during an outbreak of yellow fever in Key West) and was replaced by Uriarte. See STEBBINS, *supra* note 3, at 37.

⁵⁷ *Id.* at 36, 39.

⁵⁸ See *Formation*, *supra* note 49, at 210-11.

⁵⁹ See JOHN LIVINGSTON, *LIVINGSTON’S LAW REGISTER: A GUIDE FOR EVERY MAN OF BUSINESS, AND HAND-BOOK OF USEFUL INFORMATION 277-79* (1854).

that consuls felt any less zeal for Spain. Indeed, many Spanish consuls, including the ones in Key West, were honored for their service to the homeland. Cubells, for example, was made a Knight of the Order of Isabella the Catholic in 1862.⁶⁰

V. CONCLUSION

The Spanish consuls in Key West were important actors in the local community in the 19th century. Accordingly, bringing them back into the picture provides a richer context in which to understand the various people who passed through the “wild west” of Key West. Of course, many of the challenges that the Spanish consuls faced in Key West also were faced by Spain’s consuls in other parts of the United States.⁶¹ Consequently, consuls regularly shared tips with each other on how to execute their duties, thereby helping to hone their professional expertise and clarify consular powers and privileges in practice.⁶²

Thanks to Key West’s location near Cuba, the consuls there played a significant role in navigating Spanish-American relations during the 19th century. The more we can learn about these men, their activities, and their communications, the better we will be at stitching together various Atlantic stories, from the mundane registration of citizens to more colorful tales of murder and piracy.

⁶⁰ See AHN, *supra* note 41, at Ultramar, 4678, Exp. 4. Established in 1815, the Order recognizes both Spaniards and non-Spaniards who either have rendered extraordinary service to Spain or helped promote good relations between Spain and other countries. For a further look at the Order’s history, see ALFONSO DE CEBALLOS-ESCALERA Y GILA & VIZCONDE DE AYALA, *LA REAL Y AMERICANA ORDEN DE ISABEL LA CATÓLICA (1815-2015)* (2015).

⁶¹ See, e.g., Clifford L. Egan, *Friction in New Orleans: General Butler Versus the Spanish Consul*, 9 LA. HIST.: J. LA. HIST. ASS’N 43 (1968) (describing the many problems faced by Spain’s consul in New Orleans during the Civil War).

⁶² For more on the development of professional consular services and practices, see Jesús Núñez Hernández, *A History of the Spanish Consular Service: An Institution in Its Own Right*, in *CONSULAR AFFAIRS AND DIPLOMACY* 247 (Jan Melissen & Ana Mara Fernández eds., 2011). See also Robert M. Jarvis, *The Honorary Consul in Modern International Practice: Why Article 68 of the Final Act of the United Nations Conference on Consular Relations Should be Amended to Provide a Uniform Regime for the Sending and Receiving of Honorary Consuls*, 23 DUQ. L. REV. 905, 909-15 (1985).

GREAT BRITAIN AND THE CONFEDERACY

Michael J. Slinger*

ABSTRACT

This essay describes the efforts of the Confederate States of America to convince Great Britain to support its secession from the United States. Although the South's leaders were confident that Britain's need for cotton would lead it to become an ally, numerous factors—including the British public's aversion to slavery—contributed to the country remaining neutral.

KEYWORDS

Confederate States of America, Cotton, France, Great Britain, Key West, International Arbitration, International Diplomacy, International Law, Privateering, Prize Law, Slavery, U.S. Civil War, Union Blockade

CONTENTS

I. INTRODUCTION	359
II. HISTORICAL ROOTS OF THE CONFLICT BETWEEN GREAT BRITAIN AND THE UNITED STATES.....	359
III. THE UNITED STATES: A NATION DIVIDED BY THE INSTITUTION OF SLAVERY	360
IV. KING COTTON.....	360
V. INDUSTRIAL COMPETITION WITH THE UNITED STATES	362
VI. SECESSION OF THE SOUTHERN STATES.....	362
VII. CONDUCT OF THE WAR AND INTERNATIONAL LAW.....	364
VIII. THE AMERICAN BLOCKADE AND GREAT BRITAIN'S RESPONSE.....	366
IX. THE PRIZE CASES	367
X. THE TRENT AFFAIR NEARLY LEADS TO A BRITISH-AMERICAN WAR.....	369
XI. GREAT BRITAIN'S SURREPTITIOUS SUPPORT FOR THE CSA.....	371

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XII. LINCOLN’S EMANCIPATION PROCLAMATION ENDS THE POSSIBILITY OF
BRITISH RECOGNITION OF THE CSA372

XIII. BRITISH EFFORTS TO OBTAIN COTTON FROM OTHER SOURCES373

XIV. THE UNION’S VICTORY AND THE ALABAMA CLAIMS.....374

XV. CONCLUSION.....375

I. INTRODUCTION

In the second of his three articles in this special issue of the *British Journal of American Legal Studies*, Professor Robert M. Jarvis details how the U.S. Civil War (1861-65) affected Key West.¹ The War's impact, however, was not limited to America. Throughout Europe, the conflict also was a matter of grave concern.

The struggle particularly worried Great Britain. A victory by the Confederate States of America ("CSA") posed serious threats to Britain's food supply; its efforts to end global slavery; and its overseas territories (due to the likelihood of increased adventurism by France and Spain). In contrast, a victory by the United States carried with it the prospect of economic ruin as Britain's all-important textile industry would no longer have access to cheap Southern cotton.

As its title suggests, this essay discusses the major elements of Britain's CSA policy. Much of what Britain did came in response to decisions by President Abraham Lincoln that challenged existing international law norms. This essay also will discuss why Britain nearly took up arms against the United States—an action that would have triggered a world war—as well as how the outcome of the Civil War set the stage for a lasting friendship between the two nations.

II. HISTORICAL ROOTS OF THE CONFLICT BETWEEN GREAT BRITAIN AND THE UNITED STATES

As is well known, the United States was created following a violent break between Great Britain and 13 of its 15 North American colonies.² Until 1774, the White inhabitants of these colonies considered themselves to be English. The Revolutionary War (1775-83) was in many ways America's first civil war, pitting not just the forces of the British Crown against Americans but significant portions of the American population against each other. Pro-British Americans ("Loyalists"), being on the losing side of this conflict, often suffered severe punishments, including the confiscation of their property, even though the United States had promised, as part of the Treaty of Paris (1783), that such retributions would be avoided.³ As a result, many Loyalists ended up leaving the United States, either voluntarily or through banishment.

In the meantime, the peace between Britain and the United States proved to be a cold one. Britain still controlled large swaths of North America, including Canada and various western territories that eventually would become part of the United States. In addition, Britain continued to occupy forts in the Great Lakes region, the

¹ See Robert M. Jarvis, *The Confederate Admiralty Court at Key West*, 12 BRIT. J. AM. LEGAL STUD. 227 (2023).

² The colonies of East Florida and West Florida remained loyal to Great Britain, but at the end of the war reverted to Spanish control. In 1819, they became American territories by virtue of the Adams-Onís Treaty. See Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Feb. 22, 1819, 8 Stat. 252.

³ See Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., art. 6, Sept. 3, 1783, 8 Stat. 80.

Northwest Territory, and Upper New York, even though the Treaty of Paris required these installations to be turned over to the United States.⁴

Further conflict was threatened by the 1792 war between Britain and France. Although the United States eventually sided with Britain, resulting in the Quasi-War with France (1798-1800), it had been a close call. Many Americans supported France (the United States' principal ally in the Revolutionary War) and favored starting a new war with Britain.⁵

Subsequently, a series of escalating commercial, diplomatic, and maritime disputes between Britain and the United States resulted in the War of 1812.⁶ This confrontation was notable for its naval battles; a second attempt by the United States to capture Canada;⁷ and a concluding battle that, although a tremendous American victory,⁸ occurred two weeks after the war's official end.⁹

III. THE UNITED STATES: A NATION DIVIDED BY THE INSTITUTION OF SLAVERY

From its inception, the United States was divided economically, geographically, and morally by the institution of slavery. However, in 1776 the Northern states began to make slavery illegal. Thereafter, the economy of the two regions, although interdependent in many ways, developed radically different models. The Northern states became industrial powerhouses that would prove to be serious rivals to Europe. In contrast, the Southern states chose to remain agriculturally based, dependent upon enslaved labor. At the time of the Civil War, there were approximately four million enslaved persons in the United States, all of African descent and nearly all of whom lived in the American South.

IV. KING COTTON

The Southern states were vitally important to Britain because of the tremendous success that Southerners had growing cotton. Cotton was one of the principal

⁴ *Id.* art. 7. In 1794, the British finally agreed to relinquish their forts by June 1, 1796. See Treaty of Amity, Commerce and Navigation Between His Britannic Majesty and the United States of America by Their President, with the Advice and Consent of Their Senate, U.S.-Gr. Brit., art. 2, Nov. 19, 1794, 8 Stat. 116.

⁵ The Quasi-War ended following the signing of the Treaty of Mortefontaine (1800). See Convention Between the French Republic and the United States of America, Fr.-U.S., Sept. 30, 1800, 8 Stat. 178.

⁶ The War of 1812 was highly controversial in the United States. Delegates to the Hartford Convention (Dec. 15, 1814-Jan. 5, 1815), a meeting of New England's Federalist Party, considered seceding from the United States because of their opposition to it.

⁷ The first attempt had occurred during the Revolutionary War and was co-led by Benedict Arnold, later America's most infamous traitor but at the time its most esteemed general after George Washington.

⁸ Among other things, the Battle of New Orleans (Jan. 8, 1815) solidified the reputation of General Andrew Jackson and helped paved his way to the presidency (1829-37).

⁹ The Treaty of Ghent essentially left everything as it had been prior to the war. See Treaty of Peace and Amity Between His Britannic Majesty and the United States of America, Gr. Brit.-U.S., Dec. 24, 1814, 8 Stat. 218.

raw resources that fueled Britain's industrial revolution.¹⁰ As has been explained elsewhere:

By 1860, slave labor in the U.S. South was producing over two billion pounds of cotton per year. . . . Between the years 1820 and 1860, approximately 80 percent of the global cotton supply was produced in the United States. Nearly all the exported cotton was shipped to Great Britain, fueling its burgeoning textile industry and making the powerful British Empire increasingly dependent on American cotton and southern slavery.¹¹

The dependence on the South's cotton put the British in a truly uncomfortable position. In 1833, Britain had made slavery illegal nearly everywhere in its empire,¹² thereby transforming itself from a major slave holding society¹³ into a nation determined to fight slavery everywhere in the world.¹⁴

In seceding from the Union, the CSA counted on Britain's dependence on "King Cotton" to force it to both recognize and support the CSA. In fact, the CSA's expectation of victory was based largely on its belief that cotton was so indispensable that Britain (and the rest of Europe) would have no choice but to come to the aid of the CSA.¹⁵

¹⁰ "By the late 1700's cotton products would account for around 16% of Britain's exports; [by] the early 1800's this would multiply to around 42%. Britain was dominating the world market." Jessica Brain, *The Cotton Industry*, HISTORIC UK, at <https://www.historic-uk.com/HistoryUK/HistoryofBritain/Cotton-Industry/>. As a different source reports, by the late 1850s Britain imported about 800 million pounds of cotton every year, of which 77% came from the United States. Nearly one in five Britons depended on this cotton supply for their livelihoods. See Padraic Scanlan, *The Emancipated Empire*, AEON, Oct. 22, 2021, at <https://aeon.co/essays/the-british-empire-was-built-on-slavery-then-grew-by-antislavery>.

¹¹ P. Scott Corbett et al., *The Economics of Cotton*, in U.S. HISTORY: COTTON IS KING: THE ANTEBELLUM SOUTH, 1800-1860, Dec. 30, 2014, at <https://opened.cuny.edu/courseware/lesson/368/overview>.

¹² See An Act for the Abolition of Slavery throughout the British Colonies, (1833) 3 & 4 WILLIAM 4 C.73 (Gr. Brit.). The statute contained exceptions for Ceylon, Saint Helena, and the "Territories in the Possession of the East India Company."

¹³ "During the nearly three centuries of the transatlantic slave trade, more than 2.3 million enslaved people disembarked in Britain's Caribbean colonies, compared with roughly 390,000 in the Thirteen Colonies and the US." Scanlan, *supra* note 10.

¹⁴ Britain withdrew from the international slave trade in 1807 and thereafter took aggressive steps to stop it: "Between 1807 and 1860, the Royal Navy, West Africa Squadron seized approximately 1600 ships involved in the slave trade and freed 150,000 Africans who were aboard these vessels." Royal Naval Museum & Portsmouth Historic Dockyard, *Chasing Freedom: The Royal Navy and the Suppression of the Transatlantic Slave Trade (1807 Commemorated)*, INSTITUTE FOR THE PUBLIC UNDERSTANDING OF THE PAST & INSTITUTE OF HISTORICAL RESEARCH, 2007, at <https://archives.history.ac.uk/1807commemorated/exhibitions/museums/chasing.html>. See also *The Blockade of Africa: How Royal Navy Ships Fought the Slave Trade*, SKY HISTORY, at <https://www.history.co.uk/article/the-blockade-of-africa-how-royal-naval-ships-suppressed-the-slave-trade>.

¹⁵ As has been explained elsewhere, "If indeed the Confederacy did cut off Britain's cotton supply, [it was expected] there would be such pressure on the British government to get that cotton flowing freely to England again that it would take whatever steps

V. INDUSTRIAL COMPETITION WITH THE UNITED STATES

While the South was an invaluable economic partner to Britain because of its production of cotton, the North developed diverse industries that became a significant rival to Britain and the rest of Europe. Indeed, “by 1860, the United States was second only to Great Britain and France in manufacturing [output].”¹⁶

Business competition between nations often results in political and sometimes military conflict. It was clear that the British and the Americans viewed each other as significant rivals for control of the world’s economy. Either side would consider the industrial failure of the other as a positive outcome. This was particularly the case in Britain because American industrial output was growing by leaps and bounds. The British therefore understood that the Americans, with their access to abundant natural resources and a seemingly inexhaustible supply of immigrant labor, would one day surpass them as the world’s top industrial power.

Thus, while the British economy needed the American South, the British knew they would benefit from the harm that would result to their chief economic rival if the Southern states succeeded in leaving the Union and forming their own nation.

VI. SECESSION OF THE SOUTHERN STATES

The epic story of the decades of conflict which led to the decision by 11 Southern states to secede from the United States and form a new nation based on the perpetual protection of the institution of slavery is beyond the scope of this essay.¹⁷

The secession of the South, and the hostilities it engendered, presented Europe with a host of challenges and questions, as well as certain opportunities.¹⁸ Britain, however, faced a particularly vexing conundrum: should it support a vitally important economic partner that also was a bastion of slavery? By now, slavery

[were] necessary, including breaking the Union blockade of the Confederate coastline.” Gary W. Gallagher, *American Civil War: The Confederacy’s ‘King Cotton’ Diplomacy*, WONDRIUM LECTURE VIDEO SERIES, Dec. 31, 2020, at <https://www.wondriumdaily.com/american-civil-war-the-confederacys-king-cotton-diplomacy/>.

¹⁶ David Jaffee, *Industrialization and Conflict in America: 1840-1875*, METRO. MUSEUM OF ART: HEILBRUNN TIMELINE OF ART HISTORY ESSAYS, Apr. 2007, at https://www.metmuseum.org/toah/hd/indu/hd_indu.htm.

¹⁷ Innumerable books have been written about the events that led to the Civil War and the question of whether secession from the Union was legal. Excellent examples include: EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825-1861* (2009); BRIAN MCGINTY, *LINCOLN AND THE COURT* (2008); JAMES F. SIMON, *LINCOLN & CHIEF JUSTICE TANEY: SLAVERY, SECESSION AND THE PRESIDENT’S WAR POWERS* (2006); DANIEL FARBER, *LINCOLN’S CONSTITUTION* (2004); JAMES M. MCPHERSON, *FOR CAUSE AND COMRADES: WHY MEN FOUGHT IN THE CIVIL WAR* (1998); DAVID M. POTTER, *THE IMPENDING CRISIS, 1848-1861* (1976). Probably the best overall one volume treatment of the Civil War is JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988) (winner of the 1989 Pulitzer Prize for History).

¹⁸ Among other things, the break-up of the United States promised to lessen the threat that the country, founded on democratic principles, posed to the class-based nations of Europe. The chaos and horrors of the French Revolution (1789-99) still haunted Europe’s elite, and even France once again was under monarchical rule in the person of Emperor Napoleon III (1852-70).

had become anathema to the British government and an abomination to the British people, especially the working class. On the other hand, the British economy stood to gain from the break-up of the United States. The British therefore found themselves caught in a vise pitting their financial gain against their moral indignation.

When the Civil War began, Lincoln made it clear that his sole goal was to restore the Union.¹⁹ Thus, Lincoln's preliminary Emancipation Proclamation, issued on September 22, 1862, gave the seceded states 100 days to return to the Union with slavery intact.²⁰ Lincoln's initial refusal to make ending slavery the war's objective presented a plausible justification for the British to support the CSA, because as long as the war was only a war to restore the Union and not a war to end slavery, the British could claim they were not supporting a foe of freedom. However, this calculus changed when the final version of the Emancipation Proclamation, known as Proclamation 95, went into effect on January 1, 1863.²¹ The war now *was* a war

¹⁹ In a letter to the American newspaper publisher Horace Greeley, Lincoln explained:

My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union. I shall do less whenever I shall believe what I am doing hurts the cause, and I shall do more whenever I shall believe doing more will help the cause.

Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 388 (Roy P. Basler ed., 1953).

²⁰ See Preliminary Emancipation Proclamation, Sept. 22, 1862, at https://www.archives.gov/exhibits/american_originals_iv/sections/transcript_preliminary_emancipation.html (“[O]n the first day of January in the year of our Lord, one thousand eight hundred and sixty-three, all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free”).

²¹ Having received no responses to his previous offer, Lincoln now declared slaves free in nearly all of the CSA's 10 states (by this time Tennessee, the CSA's 11th state, was effectively in Union hands due to the battles of Fort Donelson and Fort Henry and the CSA's failed counterattack at the Battle of Shiloh (Apr. 6-7, 1862)):

I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States . . . do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my [previous proclamation of Sept. 22, 1862], order and designate as the States and parts of States wherein the people thereof respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans, including the City of New Orleans), Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia (except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth), and which excepted parts, are for the present, left precisely as if this proclamation were not issued.

to free the South's slaves. As such, British sensibilities could no longer permit any possibility of officially recognizing the CSA.

VII. CONDUCT OF THE WAR AND INTERNATIONAL LAW

The 11 Southern states that chose to secede from the Union wasted no time in declaring themselves to be an independent nation. Having their self-declared nation recognized as an independent country was a critical goal of the fledgling CSA, because this would entitle it to a host of privileges and rights under international law, including, most importantly, the right to make alliances with other nations.

Lincoln was adamant that the secession of the Southern states was a mere rebellion without legal authority and therefore had no right to either domestic or international legal protection. He therefore was determined to do all he could to see that the CSA was denied foreign recognition. This would require the United State to walk a legal, military, and political tightrope that was likely put it in conflict with international law and might lead to war with Britain and the rest of Europe.²²

In 1861, international law consisted largely of common law practices, bolstered by a few multiple-nation treaties. Largely undefined were the rights of belligerents, with a sharp distinction existing between American and European practice. Americans supported the idea that U.S.-style democracy should be encouraged throughout the world. As a result, the country had a liberal test for granting recognition to new nations, including those seeking independence through revolution.²³

The liberal policy of the United States put it squarely at odds with the more conservative interpretation favored by European officials.²⁴ However, when faced

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons. . . .

Proclamation No. 95 (Jan. 1, 1863), at <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html>. The Thirteenth Amendment to the U.S. Constitution (ratified Dec. 6, 1865) abolished slavery throughout the United States.

²² William H. Seward, the pugnacious U.S. Secretary of State, summarized matters by saying: "The Government will not shrink from using all the means which they consider necessary to restore the Union. A contest between Great Britain and the United States would wrap the world in fire, and at the end it would not be the United States which would have to lament the results of the conflict." William Howard Russell, *Mr. Russell's American Diary*, TIMES (London), Dec. 25, 1862, at 4 (quoting Seward).

²³ The United States traditionally had championed neutrality and the free-trade rights of neutrals (even with belligerents); refrained from threatening military action against Europe's great powers; and encouraged the speedy recognition of organized rebellions in the Western Hemisphere (typically involving former Latin American colonies). See Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53 (2008).

²⁴ See, e.g., [Sir] H[ersch] Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 390 (1944) ("It is contrary to international law to grant premature

with its own secession crisis during the Civil War, the United States abandoned its previous liberal approach and embraced the tougher European standard.²⁵ This interpretation greatly favored Lincoln's position that no nation should recognize the independence of the CSA. The fact that the United States was actively fighting the CSA provided strong support for its argument that the CSA's independence should not be recognized.

With international law rules unclear regarding the recognition of a new state claiming independence during a civil war, and with a country as powerful as the United States threatening retaliation against any nation that did recognize the CSA, Britain and the other nations of Europe faced a diplomatic dilemma that resulted in a reinterpretation of their own rules governing recognition:

During the American Civil War, Great Britain had occasion once more to formulate principles of recognition including the indirect acknowledgment of the duty to recognize the seceding community as soon as it fulfills the necessary requirements. In the British answer to the pressing demands of the Confederacy for recognition we find the following passage: "In order to be entitled to a place among the independent nations of the earth, a State ought to have not only strength and resources for a time, but afford promise of stability and permanence."

The French view admitting the right to recognition was also expressed at that time. While assuring the United States that no hasty or precipitate action would be taken with regard to the recognition of the independence of the Confederacy, the French Government affirmed that "the practice and usage of the present century had fully established the right of *de facto* Governments to recognition when a proper case was made out for the decision of foreign Powers."²⁶

By this time, Lincoln had decided to adopt a hybrid strategy that prioritized taking whatever steps were necessary to win the war, but with a nod to international law, even if generally accepted international rules would not be followed. In effect, Lincoln was daring the British and other nations to acquiesce, or at least

recognition. Communities claiming political independence arise as a rule by secession from the parent State. It is generally agreed that in relation to the parent State recognition is governed by a duty of restraint the disregard of which entails responsibility on the part of the recognizing State.").

²⁵ As Lauterpacht noted:

The question whether France committed a breach of international law by her early recognition of the United States in 1778; the protracted controversy concerning the Spanish protests against the recognition of the Latin American Republics by the United States and Great Britain; the demand of the Confederate States for recognition during the American Civil War, a demand which was discussed mainly not from the point of view of the right of the Confederacy to recognition, but by reference to the propriety of such a step in relation to the United States; . . . all these incidents have occupied international lawyers as questions of premature recognition. It is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency.

Id. at 391.

²⁶ *Id.* at 401.

not interfere, with what he was doing. The consequences for any nation strictly following the rules of international law would be war with the United States.

Lincoln's war policies included a demand that there be no recognition of, or official support for, the CSA; a naval blockade that would defy the conventional rules of international law; the treatment of captured rebels as prisoners of war rather than traitors; and the confiscation of property of both Americans and foreigners even if this violated international law customs.

VIII. THE AMERICAN BLOCKADE AND GREAT BRITAIN'S RESPONSE

One of Lincoln's first major strategic decisions was to declare a blockade against the CSA's coast.²⁷ Under international law at this time, however, a blockade was legal only when directed against another nation and was not considered a legitimate option in a civil war. The option that *was* available under international law was to close the rebel ports. However, the United States could not close the CSA's ports because they were heavily guarded by the CSA's military.²⁸ As Jarvis points out in his article, Key West was a notable exception and remained in Union hands throughout the war.

International law authorized a nation establishing a legal blockade to interdict and seize foreign ships on the high seas if they were suspected of trading with the enemy, something Lincoln believed was vital to stem the flow of imported goods to the rebels. However, Lincoln was running a tremendous risk in establishing what, under international law, appeared to be an illegal blockade, because an illegal blockade was considered an act of war that gave other nations the right to go to war against the United States.

There was strong sentiment in favor of the CSA among many in the British government—including Lord Palmerston, the country's prime minister (1855-58; 1859-65).²⁹ All of these politicians, however, hoped that the CSA could win without Britain being drawn into the conflict.

In responding to the United States' blockade, Queen Victoria accepted the advice of Lord John Russell, Britain's foreign secretary, who believed that the best course was neutrality.³⁰ Yet despite being officially

²⁷ See Proclamation 81—Declaring a Blockade of Ports in Rebellious States, Apr. 19, 1861, at <https://www.archives.gov/files/education/lessons/images/union-blockade.pdf>. Due to its lack of any significant manufacturing capacity, the CSA needed to import nearly everything needed to wage war, including clothing, medicine, and weapons.

²⁸ On May 1, 1862, the Union did manage to capture New Orleans, the CSA's largest port. However, the capture of most of the CSA's other major ports—including, Galveston, Mobile, Norfolk, Pensacola, Savannah, and Wilmington, North Carolina—did not occur until near the end of the war.

²⁹ At the same time, the government included a sizeable number of U.S. advocates. Britain's working class, being anti-slavery, also favored the Union.

³⁰ See AMANDA FOREMAN, *A WORLD ON FIRE: BRITAIN'S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR* 92 (2010). "In declaring neutrality, Russell was convinced he had chosen the best alternative; he had consulted the law officers of the Crown, as he always did when in doubt, and in their opinion the crisis in America was not a minor insurgency but a genuine state of war." *Id.* at 93.

neutral,³¹ Britain recognized the CSA as a “belligerent”—meaning that it was engaged in a war and not a mere rebellion—due to its clear government structure; economic strength; and significant military power.³² Although Lincoln privately fumed at Britain’s decision to grant the CSA belligerent status,³³ he did not publicly challenge it.³⁴

Despite their country’s official position, British nationals surreptitiously sold the CSA arms and other articles of war; built it warships; and supplied other needed goods. Many of the “blockade runners” who brought these items to the CSA were British citizens. The British also provided sanctuary in Canada for the CSA’s Secret Service; sheltered CSA warships and privateers in safe harbors;³⁵ and refused to extradite CSA fugitives. As is explained later in this essay, the United States did not call the British to account for these actions until after the Civil War.

IX. THE PRIZE CASES

Lincoln’s decision to blockade the CSA’s ports was not merely suspect under international law. It also led to a domestic legal challenge, dubbed *The Prize Cases*, that eventually reached the U.S. Supreme Court. This constituted a serious threat as the Court could declare Lincoln’s action to be unconstitutional, a result that might possibly stop the war.

Particularly worrisome for Lincoln was the fact that Roger B. Taney, who had been appointed chief justice in 1836 by President Andrew Jackson, was still on the

³¹ See *Queen’s Proclamation of Neutrality*, LONDON GAZETTE, May 14, 1861, at 2046-47.

³² Under international law, belligerency is defined as “the condition of being in fact engaged in war. A nation is deemed a belligerent even when resorting to war in order to withstand or punish an aggressor. A declaration of war is not necessary to create a state of belligerency.” *Belligerency*, in ENCYCLOPEDIA BRITANNICA (1998), at <https://www.britannica.com/topic/belligerency>. Other European nations quickly adopted Britain’s position.

³³ See Charles Zorgbibe, *Sources of the Recognition of Belligerent Status*, 17 INT’L REV. RED CROSS 111, 116 (1977).

³⁴ One reason for Lincoln’s reticence was the fear of provoking a war with Britain. The other was that the British had decided not to bestow on the CSA the full panoply of rights normally accorded belligerents:

A close examination of the wording [of Queen Victoria’s proclamation] showed that Russell had taken away many of the advantages that belligerent status has initially seemed to give to the Confederacy. He had invoked the rarely used 1819 Foreign Enlistment Act, under which British subjects were forbidden to volunteer for a foreign cause or encourage others to do so. The act also prohibited the selling or arming of warships to either belligerent; those who disobeyed the proclamation would be prosecuted, and the offending items confiscated.

FOREMAN, *supra* note 30, at 93 (footnote omitted).

³⁵ In 1856, at Britain’s insistence, privateering had been made illegal under international law. See *Declaration Respecting Maritime Law*, 16 Apr. 1856, Gr. Brit.-Austria-Fr.-Pruss.-Russ.-Sard.-Turk., 46 BSP 26 (1865). In its support of the CSA, Britain chose to ignore this inconvenient fact.

bench. In 1857, Taney had authored the infamous *Dred Scott* decision, which had held that Congress could not prohibit slavery in U.S. territories.³⁶

Lincoln and Taney were far from friends. Lincoln had made a reputation for himself by criticizing the *Dred Scott* decision and claiming the Justices were part of a conspiracy designed to make slavery legal everywhere in the United States. Lincoln and Taney also had clashed in *Ex parte Merryman*,³⁷ a decision in which Taney, while “riding circuit,” had found illegal Lincoln’s executive order suspending the writ of *habeas corpus*. Lincoln responded by ignoring Taney’s ruling. Because of this history, Lincoln knew that his blockade of the CSA’s ports would not have an easy time at the Court.

The appellants in *The Prize Cases* argued that Lincoln’s Proclamation 81 (Apr. 19, 1861), which gave the U.S. Navy the authority to interdict and, if necessary, seize ships suspected of attempting to bring goods in or out of the CSA, was illegal. The blockade also authorized the U.S. Navy to board ships on the high seas suspected of trading with the CSA. Ships so captured were turned over to the U.S. federal district courts for adjudication. If found guilty, the ships and their cargoes would be sold and the proceeds given to the United States, out of which prize shares would be awarded to the capturing crew.

Lincoln implemented the blockade, and took several other constitutionally questionable actions, while Congress was in recess.³⁸ However, when he called it back into session on July 4, 1861, it

passed resolutions granting the President the prospective power to declare parts of the country in “insurrection” and to proscribe commerce to and from such parts. . . . For reasons that remain obscure, Congress did not enact a specific statute ratifying Lincoln’s measures but rather approved them in a roundabout rider tacked onto a statute increasing pay for federal troops.³⁹

In *The Prize Cases*, the owners of four merchant ships (*Amy Warwick*, *Brilliant*, *Crenshaw*, and *Hiawatha*) brought suits challenging various condemnation orders that had been issued pursuant to Proclamation 81 *before* Congress’s approval of the blockade. The *Hiawatha*, for example, was a British-flagged barque. While on a voyage from Richmond to Liverpool with a cargo of tobacco owned by British and Virginia interests, it was seized by the USS *Minnesota* (the flagship of the North Atlantic Blockading Squadron) in Hampton Roads, Virginia, on May 20, 1861.

At the U.S. Supreme Court, several legal theories were relied on by the appellants, including inadequate notice of the commencement of the blockade and the absence, under both United States and international law, of any right to institute

³⁶ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). In addition to Taney, four other Justices who had sided with him in *Dred Scott* were still on the court: John Catron, Robert C. Grier, Samuel Nelson, and James M. Wayne.

³⁷ 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

³⁸ These additional actions included creating a 75,000-man army; funding the military; and suspending the writ of *habeas corpus*, all of which arguably violated Congress’s exclusive powers. See U.S. CONST. art. I, §§ 8-9.

³⁹ Lee, *supra* note 23, at 57 (footnotes omitted).

a blockade. On March 10, 1863, by a 5-4 vote, the Court upheld the blockade.⁴⁰ In a lengthy dissent, Justice Nelson, joined by Chief Justice Taney and Justices Catron and Clifford, excoriated Lincoln for abusing his authority and usurping Congress's powers.

X. THE TRENT AFFAIR NEARLY LEADS TO A BRITISH-AMERICAN WAR

Pride and resentment had a great deal of influence on the relations between Great Britain and the United States during the American Civil War. These traits were most pronounced in two of the most powerful politicians in their respective countries.

British Prime Minister Lord Palmerston (Henry John Temple, 3rd Viscount Palmerston) had little respect or affection for the United States. As such, he had a strong desire to support the CSA because it would hurt (perhaps irreparably) the United States. Born in Westminster on October 20, 1784, Palmerston had been Britain's Secretary at War during the War of 1812.

Palmerston's chief antagonist was U.S. Secretary of State William H. Seward.⁴¹ Seward's bellicosity towards the British proved to be an ongoing problem for Lincoln and Charles F. Adams, the latter of whom was serving as the United States' ambassador to Great Britain.⁴² Both men engaged in considerable efforts to blunt Seward's comments and, in Adams's case, to calm British officials incensed by Seward's incendiary views.

The spark of actual military conflict between Britain and the United States nearly was lit by the *Trent* Affair. In an effort to obtain recognition and support from Britain and Europe, the CSA had ordered two of its most able statesmen—former U.S. Senators James M. Mason and John Slidell—to travel to England and France to lobby for support.⁴³ Getting them to Europe, however, meant running the Union blockade.

⁴⁰ See *The Prize Cases*, 67 U.S. (2 Black) 635 (1863). Although they had sided with Chief Justice Taney in the *Dred Scott* decision, see *supra* note 36, Justices Grier and Wayne broke ranks and joined forces with Lincoln's three recent (1862) appointees to the Court: Justices David Davis, Samuel F. Miller, and Noah H. Swayne. Writing for the majority, Grier explained: "The President was bound to meet it [the war] in the shape it presented itself, without waiting for Congress to baptize it[.]" *Id.* at 669.

⁴¹ Seward was born in Orange County, New York, on May 16, 1801. Before the Civil War, he was one of the country's leading abolitionists. Like Lincoln, he had sought the Republican Party's 1860 presidential nomination. A decided Anglophobe, he had made it clear he would welcome a war with Britain if it offered recognition to the CSA. See NORMAN B. FERRIS, *DESPERATE DIPLOMACY: WILLIAM H. SEWARD'S FOREIGN POLICY, 1861* (1976).

⁴² Charles Francis Adams, Sr., was born in Boston on August 18, 1807, and was the third son of U.S. Founding Father John Adams. He served as U.S. Envoy (chief diplomat) to Great Britain from May 16, 1861, to May 13, 1868. See *Adams, Charles Francis, 1807-1886*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, at <https://bioguide.congress.gov/search/bio/A000032>. Adams possibly is the most unsung hero in keeping Britain from recognizing the independence of the CSA. He also was very effective at thwarting the diplomatic efforts of the CSA's envoys in Europe.

⁴³ Mason and Slidell were picked to replace three other CSA diplomats—Ambrose D. Mann, Pierre A. Rost, and William L. Yancey—who for months had failed to make any progress in convincing Europe to side with the CSA. See Paul Zingg, "The Diplomatic

On October 12, 1861, Mason and Slidell began their trip by boarding the *Theodora*, a merchant ship, in Charleston, South Carolina. Slipping past the U.S. Navy, the *Theodora* made her way to Nassau, in The Bahamas, where Mason and Slidell were supposed to transfer to a British ship. The pair missed their connection, however, forcing the *Theodora* to head to Cuba. Once in Havana, Mason and Slidell arranged berths on the British mail packet *Trent*.

By this time, Mason and Slidell's plans had come to the attention of Captain Charles Wilkes, the commander of the USS *San Jacinto*. Thus, on November 8, 1861, just one day after the *Trent* had left Havana, Wilkes intercepted her in the Bahama Channel and forcibly removed Mason and Slidell and their secretaries (respectively, James E. McFarland and George Eustis, Jr.). On November 24, 1861, Wilkes delivered the quartet to Fort Warren in Boston Harbor, a Union prison for captured rebels.

Americans loyal to the Union cheered the arrests and Congress passed a resolution expressing its appreciation to Wilkes and his crew. In contrast, CSA sympathizers were dismayed by the news but hoped the event would bring Britain into the war on their side. The British response was sheer outrage. Palmerston, believing it was time to teach the United States a lesson,⁴⁴ ordered 12,000 British troops to Canada. In addition, Palmerston's cabinet created a War Committee to plan an attack on the United States.⁴⁵ The British demanded both an apology and the freeing of Mason and Slidell so that they could continue their journey to Europe. It was made clear that the only other alternative was war.

Upon learning of the incident, Lincoln remarked to Attorney General James Speed:

I am not getting much sleep out of that exploit of Wilkes', and I suppose we must look up the law of the case. I am not much of a prize lawyer, but it seems to me pretty clear that if Wilkes saw fit to make that capture on the high seas he had no right to turn his quarter-deck into a prize court.⁴⁶

Lincoln clearly understood the harm that might result from the seizure and told his cabinet he was willing to fight only one war at a time.

Two letters were prepared by the British, both harsh in their condemnation of the United States' actions. Neither left much room for a peaceful resolution. The drafts were sent to Queen Victoria for her approval. Although dying from typhoid fever, Prince Albert, the queen's beloved husband, edited the drafts and added language that gave the two sides a graceful way out of the crisis.⁴⁷ It was Prince

Mission of Yancey, Rost and Mann: The Inadequacies of Confederate Foreign Policy, 1861," at 84-85 (unpublished M.A. thesis, University of Richmond, Aug. 1969), at <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2266&context=masters-theses>.

⁴⁴ See JAMES CHAMBERS, PALMERSTON: THE PEOPLE'S DARLING 487 (2004) (quoting Palmerston as saying that it was time "to read a lesson to the United States which will not soon be forgotten.").

⁴⁵ See FOREMAN, *supra* note 30, at 183.

⁴⁶ Titian J. Coffey, in REMINISCENCES OF ABRAHAM LINCOLN BY DISTINGUISHED MEN OF HIS TIME 233, 245 (Allen Thorndike Rice ed., 1886).

⁴⁷ See FOREMAN, *supra* note 30, at 181-82 ("The Queen . . . should have liked to have seen the expression of a hope [in the message to Seward] that the American captain did not

Albert's last service to his nation and one of his most important.

After considerable debate—and the realization that a war with Britain while fighting the CSA would be disastrous—the United States accepted Prince Albert's view that Wilkes had acted without orders. Although a formal apology was not issued, Mason and Slidell and their secretaries were released from Fort Warren on January 1, 1862, and reached Southampton, England, four weeks later. Feelings on both sides of the Atlantic continued to be hurt, but war had been avoided.

XI. GREAT BRITAIN'S SURREPTITIOUS SUPPORT FOR THE CSA

Despite Queen Victoria's decree of neutrality forbidding British subjects to support either side,

supplies and money still flowed from Britain into the southern states throughout the Civil War. These resources were vital to sustaining the Confederate war effort, especially following the North's imposition of the blockade of the South, beginning in April, 1861. Obtaining a supply of goods and money from Britain required only private business relationships with British merchants and factory owners, not popular or government approval. Britain's premier port of Liverpool offered a trading environment that was favorable to dealing with the renegade states of the Confederacy, and this city soon became a primary base of southern support.⁴⁸

The most important aid given by the British to the CSA involved the building of warships:

James Dunwoody Bulloch, the Confederacy's chief foreign agent in Great Britain, led [the] effort to obtain Confederate ships in Liverpool. He particularly negotiated with John Laird Sons & Co. in Birkenhead, across the Mersey River estuary from Liverpool, to build warships for the South. British neutrality meant that warships could not legally be built in the country for either side, but Bulloch circumvented this problem by ensuring that the ships, while clearly designed for battle, were not actually

act under instructions, or, if he did that he misapprehended them [and] that the United States government must be fully aware that the British Government could not allow its flag to be insulted, and the security of her mail communications to be placed in jeopardy, and [that] Her Majesty's Government [is] unwilling to believe that the United States Government intended wantonly to put an insult upon this country and to add to their many distressing complications by forcing a question of dispute upon us, and that we are therefore glad to believe . . . that they would spontaneously offer such redress as alone could satisfy this country, viz: the restoration of the unfortunate passengers and a suitable apology.”)

⁴⁸ Chris Williams et al., *Liverpool's Abercromby Square and the Confederacy During the U.S. Civil War: British Support During the U.S. Civil War*, LOWCOUNTRY DIGIT. HIST. INITIATIVE, at <https://ldhi.library.cofc.edu/exhibits/show/liverpools-abercromby-square/britain-and-us-civil-war>.

fitted with armaments in Britain. Through this strategy, the ships could be presented as civilian vessels when they left British jurisdiction, but they would then travel to Terceira, a Portuguese island located in the North Atlantic archipelago of the Azores, where they were armed. Bulloch's subterfuge was blatant, but it successfully confused the legal definition of what could be defined a warship in Great Britain.⁴⁹

Britons also participated in the fighting. According to British-American historian Amanda L. Foreman, 50,000 British citizens served in various capacities in the American Civil War.⁵⁰ The vast majority of these men fought in the Union Army, presumably due to the antipathy most Britons had towards slavery.

XII. LINCOLN'S EMANCIPATION PROCLAMATION ENDS THE POSSIBILITY OF BRITISH RECOGNITION OF THE CSA

The first year of the war (April 1861 to April 1862) saw a string of CSA military victories. France had been pressuring the British to join it in insisting that the two American sides submit to international mediation to end the conflict.⁵¹ This was something to which Lincoln would never agree. Palmerston leaned toward supporting forced mediation⁵² and by September 1862 hoped that one more decisive CSA victory would be the catalyst to force it on the United States.

⁴⁹ *Id.*

⁵⁰ See Megan Gambino, *The Unknown Contributions of Brits in the American Civil War: An Interview with Historian Amanda Foreman*, SMITHSONIAN MAG., Dec. 9, 2011, at <https://www.smithsonianmag.com/history/the-unknown-contributions-of-brits-in-the-american-civil-war-2478471/>.

⁵¹ France's call for mediation was not motivated by humanitarian concerns. Instead, it was part of its plan to seize Mexico (in violation of America's "Monroe Doctrine"). In 1862, France went ahead with its plan and set up a puppet government in Mexico. Immediately after the Civil War ended, the United States helped to evict the French from Mexico. See EDWARD SHAWCROSS, *THE LAST EMPEROR OF MEXICO: THE DRAMATIC STORY OF THE HABSBURG ARCHDUKE WHO CREATED A KINGDOM IN THE NEW WORLD* (2021) (detailing the reign of Maximilian I, who, having been installed by Emperor Napoleon III of France, served as emperor of Mexico from 1864 until his execution by a firing squad in 1867).

⁵² As has been explained elsewhere,

International law permitted intervention by neutral nations to prevent irreparable harm in their own interests. The British people were not required to stand by as witnesses to economic chaos and political unrest in their homeland caused by other peoples' quarrels. That summer, British ministers and Parliament seriously debated all options from mediation to mandated arbitration, with force if necessary, which almost certainly would have led to Confederate independence. No one doubted [that the British] had the navy to do it.

Dwight Hughes, *The Emancipation Proclamation: An International Turning Point*, EMERGING CIVIL WAR, Jan. 2, 2018, at <https://emergingcivilwar.com/2018/01/02/the-emancipation-proclamation-an-international-turning-point/>.

As noted earlier in this essay, it was during this time that Lincoln made his fateful decision to turn the war from simply a battle to save the Union into a war for freedom by issuing his preliminary Emancipation Proclamation.

Fearing that the proclamation might be viewed as little more than an act of desperation given how the war was going, Lincoln decided to hold off announcing it until he had a Union victory in hand. That victory came at the Battle of Antietam on September 17, 1862.⁵³

The reaction among the British working class and liberals in Parliament was electric. Although many in the British press were skeptical and viewed Lincoln's announcement as a mere ploy to gain European sympathy, the British people now considered the Civil War a war for freedom.⁵⁴ As a result, any possibility that Britain would recognize the independence of the CSA or provide it with direct support was extinguished.

XIII. BRITISH EFFORTS TO OBTAIN COTTON FROM OTHER SOURCES

The CSA believed that Britain's economy could not survive without Southern cotton. As a result, the CSA felt it was inevitable that Britain (and the rest of Europe) would join its fight for independence. In making this calculation, the CSA overlooked three important facts.

First, due to a food shortage in Europe, the British desperately needed corn and wheat from the Northern United States. These items were much more critical to the maintenance of daily life in Britain than Southern cotton. Second, prior to the commencement of the Civil War, the British had realized that the flow of Southern cotton would be imperiled. As a result, its merchants had gone on a buying binge. This stockpile helped to mitigate the subsequent damage to Britain's economy. Third, recognizing that no stockpile would be enough, the British began to encourage the expansion of cotton growing in Egypt and India. This effort proved highly successful in replacing Southern cotton during the latter stages of the war.⁵⁵

⁵³ Antietam was the single bloodiest day of combat in American history. Although more of a technical victory than a decisive win, it gave Lincoln what he needed. See *The Cost of War: Killed, Wounded, Captured, and Missing (Civil War Casualties)*, AM. BATTLEFIELD TR., at <https://www.battlefields.org/learn/articles/civil-war-casualties>.

⁵⁴ As one source has explained, "The British people strongly opposed slavery. When they heard that the slaves would be freed, they gave their support immediately to President Lincoln and the North." *Emancipation Proclamation: January 1st, 1863*, VCU LIBR. SOC. HIST. PROJECT, at <https://socialwelfare.library.vcu.edu/federal/emancipation-proclamation-1862/>.

⁵⁵ For a further discussion, see Frenise A. Logan, *India—Britain's Substitute for American Cotton, 1861-1865*, 24 J. S. HIST. 472 (1958); Edward Mead Earle, *Egyptian Cotton and the American Civil War*, 41 POL. SCI. Q. 520 (1926); Ricky Dale-Calhoun, "Seeds of Destruction: The Globalization of Cotton as a Result of the American Civil War" (unpublished Ph.D. thesis, Kansas State University, 2012), available at <https://core.ac.uk/download/pdf/10652841.pdf>.

XIV. THE UNION'S VICTORY AND THE ALABAMA CLAIMS

By the spring of 1865, the CSA's armies had been defeated and the Southern economy was in shambles. Four years of civil war had resulted in at least 720,000 military deaths and an unknowable number of civilian casualties. The war's final chapter saw the tragic assassination of Lincoln by Southern stalwart John Wilkes Booth (Apr. 14, 1865) followed by a torturous period referred to as "Reconstruction" (1865-77). Hard feelings between the victorious North and the vanquished South resulted in decades of estrangement. Freedom for the enslaved was made permanent by the passage of the Thirteenth Amendment to the U.S. Constitution, which Lincoln had championed. However, a bitter period of racial segregation and discrimination known as "Jim Crow" would last nearly a century.⁵⁶

Although the war was over, the U.S. Congress could neither forget nor forgive the surreptitious support the British had given the CSA. Even though the British argued that any such support had been illegal and was unsanctioned by the Crown, Congress believed otherwise and demanded that the British be held to account.

As explained earlier in this essay, British shipyards had built several ships for the CSA.⁵⁷ The most successful of these ships, the CSS *Alabama*, was credited with 58 captures of U.S. merchantmen before it was sunk in an 1864 battle with the USS *Kearsarge* off the coast of Cherbourg, France. Other CSA ships built by the British included the *Florida*, *Georgia*, *Rappahannock*, and *Shenandoah*.⁵⁸

The resulting dispute over these ships became known as the *Alabama* Claims. Taking a hard stance, the United States demanded exorbitant compensation:

Charles Sumner, Chairman of the Senate Foreign Relations Committee, argued that British aid to the Confederacy had prolonged the Civil War by 2 years, and indirectly cost the United States hundreds of millions, or even billions of dollars (the figure Sumner suggested was \$2.125 billion). Some Americans adopted this argument and suggested that Britain should offer Canada to the United States in compensation.⁵⁹

Following six years of negotiation, Britain agreed to arbitrate the matter and eventually paid the United States \$15.5 million (the equivalent today of \$389 million).⁶⁰ Although not recognized at the time, the settlement of the *Alabama*

⁵⁶ Jim Crow laws in the Southern states ensured second class citizenship and rank discrimination against African Americans. Shamefully, these laws were upheld repeatedly by the U.S. Supreme Court until *Brown v. Board of Education*, 347 U.S. 483 (1954), which changed the Court's direction and helped give rise to America's Civil Rights movement.

⁵⁷ These ships were responsible for at least 150 captures or sinkings of U.S. ships. See *The Alabama Claims, 1862-1872*, U.S. OFF. OF HIST.: MILESTONES: 1861-1865, at <https://history.state.gov/milestones/1861-1865/alabama> [hereinafter MILESTONES].

⁵⁸ The *Georgia* is credited with starting the CSA's only "foreign war," a one-hour skirmish with Morocco in February 1864. See William Oliphant Kendrick Rentz, *The Confederate States Ship Georgia*, 56 GA. HIST. Q. 307, 314-15 (1972).

⁵⁹ MILESTONES, *supra* note 57.

⁶⁰ See *id.* ("The British Government expressed regret for its contribution to the success of Confederate commerce raiders. This agreement, dated May 8, 1871, and known as the Treaty of Washington, also established an arbitration commission to evaluate the merit

Claims began a period of reproachment between Britain and the United States that eventually would forge, in the words of Prime Minister Winston Churchill, a “special relationship” between the two former enemies.⁶¹

XV. CONCLUSION

The U.S. Civil War, of course, was a uniquely American event. But the vital role played by Great Britain—and the decisions it made as the conflict raged on—should not be overlooked. Indeed, the war cannot be fully understood without a careful examination of Britain’s actions and inactions.

of U.S. financial claims on Britain.”). *See also* J.C. BANCROFT, *THE CASE OF THE UNITED STATES TO BE LAID BEFORE THE TRIBUNAL OF ARBITRATION TO BE CONVENED AT GENEVA* (1871). The United States subsequently established a specialized court to disburse the money received from Great Britain. *See* Act of June 23, 1874, ch. 459, 18 Stat. 245.

⁶¹ *See* David Reynolds, *The Churchill Government and the Black American Troops in Britain During World War II*, 35 *TRANSACTIONS OF THE ROYAL HIST. SOC’Y* 113, 133 (1985) (explaining that Churchill first used the phrase “special relationship” in a February 1944 speech).

ISLAND MUSINGS: A SELECTIVE BIBLIOGRAPHY OF EARLY KEY WEST

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ABSTRACT

This bibliography identifies and describes 75 works that focus on Key West during its first 50 years (1821-71) as a U.S. possession. General, legal, and popular culture materials are included.

KEYWORDS

Cigar Manufacturing, Confederate States of America, Criminal Justice, Cuba, Disease, Feminism, Fishing and Sponging, Florida Keys, Forts, Historiography, Hurricanes, Key West, Marine Salvage, Slavery, Spain, U.S. Civil War, William Marvin, Wrecks and Wrecking

CONTENTS

I. INTRODUCTION	378
II. GENERAL WORKS	378
A. Books	378
B. Articles	381
C. Journals	384
D. Dissertations.....	384
III. LEGAL WORKS	385
A. Books	385
B. Articles	385
C. Primary Sources	386
1. Confederate Sources	386
2. Federal Sources.....	387
3. Florida Sources	388
IV. POPULAR CULTURE WORKS	388

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I. INTRODUCTION

This bibliography lists selected works that focus on Key West's first 50 years as part of the United States (1821-71). Its purpose is to help readers dig deeper into the topics touched on in this special issue of the *British Journal of American Legal Studies*.

As will be seen, the entries are divided into three groups: general works; legal works; and popular culture works. It should be noted that many of the older writings contain language that modern readers will find unacceptable.

At the time of the United States' takeover of Florida from Spain (1821), Key West was a remote island straddling the Atlantic Ocean and the Gulf of Mexico. In 1832, however, it was transformed into an important commercial hub after Congress passed legislation expanding its jurisdiction as a port of entry for foreign goods. Subsequently, the city developed a thriving sponging industry (1852) and later became a leading cigar manufacturing center (1868).

No line of work, however, was more important to the development of Key West than wrecking (1822-60). The salvaging of ships and their cargoes, and the issuing of salvage awards by the local federal district court, helped to make Key West the richest community in the United States prior to the Civil War.

Despite its economic successes, Key West was a dangerous and lawless place. Early inhabitants—a mix of Americans, Bahamians, Cubans, and Spaniards, among others—also had to contend with boredom (due to the city's isolated location); disease (particularly yellow fever); fires (a constant threat, given that nearly every building on the island was constructed out of wood); hurricanes; and, in the summer, stifling heat. Of course, local leaders, eager to entice new residents, cheerfully described Key West as a tropical paradise and boasted about its abundant natural beauty, gentle sea breezes, and hospitable climate.

In contrast to the rest of the South, Key West's economy was not based on agriculture or cotton. Nevertheless, it was heavily reliant on, and cruelly exploited, enslaved people. Thus, it is no surprise that when the Civil War broke out, most of the city's White residents sided with the Confederacy. Uniquely, however, Key West, home to two U.S. military forts (Thomas Jefferson on nearby Garden Key and Zachary Taylor at the city's southwest tip), remained firmly in Union hands throughout the long conflict (1861-65).

Over time, the foregoing factors caused this small island city to become one of the most unusual places in the United States, a town where criminals and spies mingled easily and freely with carpenters and mariners (and the occasional lawyer). The story of Key West's development is a captivating one, as the works listed below amply illustrate.

II. GENERAL WORKS

A. BOOKS

1) LAURA ALBRITTON & JERRY WILKINSON, *HIDDEN HISTORY OF THE FLORIDA KEYS* (The History Press, 2018)

Although this book covers the entire Florida Keys (which begin in Key Largo and stretch southward to Key West), much of the focus is on Key West. Albritton

and Wilkinson spend considerable time discussing life on the island in the 19th century, including the many scores that were settled on the city's "dueling grounds."

2) JEFFERSON B. BROWNE, *KEY WEST: THE OLD AND THE NEW* (Record Company, 1912)

Browne's text is one of the most widely cited sources on the history of Key West. It covers all major aspects of life in the city, including business, education, hurricanes, industry, migration, wars, wrecking, and more. Some researchers may be frustrated, however, by Browne's narrative style.

3) J. WILLS BURKE, *THE STREETS OF KEY WEST: A HISTORY THROUGH STREET NAMES* (Pineapple Press, 2015)

Burke tells the story of Key West's founding by indicating how the island's streets got their names. For each street, Burke provides a profile of its namesake followed by interesting tidbits about its buildings and residents.

4) ARLO HASKELL, *THE JEWS OF KEY WEST: SMUGGLERS, CIGAR MAKERS, AND REVOLUTIONARIES (1823-1969)* (Sand Paper Press, 2017)

This book traces the roots of Key West's Jewish community. It includes sketches of the city's earliest Jewish residents, such as Levi Charles Harby, a member of the West Indies Squadron (tasked with clearing pirates from the waters around Key West), and Moses Cohen Mordecai, a local shipping magnate. Haskell details the challenges of doing business in a place where a small boat was more useful than a horse-and-cart and explains how the many calamities that befell Key West affected its residents. Using the narratives of (mostly) men, Haskell develops a clear picture of what Jewish life was like in early Key West.

5) WALTER C. MALONEY, *A SKETCH OF THE HISTORY OF KEY WEST, FLORIDA* (Advertiser Printing House, 1876)

The earliest edition of this book was merely an expanded version of the author's address at the dedication of Key West's new city hall (July 4, 1876). Later editions added an introduction and index. Maloney briefly recounts the story of Key West from 1820 to 1876, with basic information about local commercial enterprises and social institutions. Because Maloney was an attorney, there also is a discussion of the court system and judiciary.

6) MAUREEN OGLE, *KEY WEST: HISTORY OF AN ISLAND OF DREAMS* (University Press of Florida, 2003)

The first half of this book covers the American takeover from Spain and discusses the features that made Key West attractive to business and government interests. Ogle details the development and impact of various local industries, including, of course, cigar manufacturing, sponging, and wrecking. She also discusses how international relations and war contributed to the city's development.

7) MIKE PRIDE, *STORM OVER KEY WEST: THE CIVIL WAR AND THE CALL OF FREEDOM* (Pineapple Press, 2020)

This book describes how the Civil War affected Key West, particularly its Black population, who were promised freedom in exchange for defending the city's federal military installations. Pride also writes about the devastating effects the Union blockade and repeated outbreaks of yellow fever had on the island's residents.

8) LEWIS G. SCHMIDT, *THE CIVIL WAR IN FLORIDA: FLORIDA'S KEYS AND FEVERS* (L.G. Schmidt, 1992)

This book, volume 3 of Schmidt's four volume *The Civil War in Florida: A Military History*, describes what life was like for the Union troops stationed in Key West during the Civil War. Beginning in the Summer of 1998, and continuing

through the Summer of 2000 (nine successive issues), portions of Schmidt's book were reprinted in the *Florida Keys Sea Heritage Journal*.

9) CONSUELO E. STEBBINS, *CITY OF INTRIGUE, NEST OF REVOLUTION: A DOCUMENTARY HISTORY OF KEY WEST IN THE NINETEENTH CENTURY* (University Press of Florida, 2007)

Stebbins tells Key West's story by examining its documentary past, including consular notes, government records, newspaper articles, and ship reports. Much of the focus is on the relationship between the city and its former ruler (Spain).

10) THOMAS W. TAYLOR, *THE KEY WEST LIGHTHOUSE: A LIGHT IN PARADISE* (Infinity Publishing, 2004)

In this book, Taylor tells the fascinating story of the Key West lighthouse, which began operating in 1825. Its purpose was to help guide mariners as they navigated the treacherous reefs and shoals around Key West.

11) JOHN BERNHARD THUERSAM, *KEY WEST'S CIVIL WAR: "RATHER UNSAFE FOR A SOUTHERN MAN TO LIVE HERE"—OCCUPATION, TREASONABLE UTTERANCES, AND KEY WEST AVENGERS* (Shotwell Publishing LLC, 2022)

Thuersam bills his book as "the first to present a comprehensive account of [Key West] during the war." The text is supplemented by an extensive bibliography.

12) TODD TURRELL, BRIAN SCHMITT & ROBERT S. CARR, *THE FLORIDA KEYS—A HISTORY THROUGH MAPS* (Tru-Craft Litho, Ltd., 2019)

The authors of this handsomely illustrated book recount the history of the Florida Keys through the use of both ancient and modern maps. Chapter 7 focuses on Key West.

13) JOHN VIELE, *A HISTORY OF THE PIONEERS: THE FLORIDA KEYS—VOLUME 1* (Pineapple Press, 2011)

This book, the first of a three-part series (*see next two entries*), examines the lives of the Keys' first settlers. Viele details the extreme conditions experienced by these people, who had to contend with (among other things) disease, hurricanes, and pests.

14) JOHN VIELE, *TRUE STORIES OF THE PERILOUS STRAITS: THE FLORIDA KEYS—VOLUME 2* (Pineapple Press, 2011)

Volume 2 of this series examines the dangers posed by the waters surrounding the Keys. Viele uses various historical documents to depict these dangers, which included pirates, unmarked reefs and shoals, and unpredictable weather.

15) JOHN VIELE, *THE WRECKERS: THE FLORIDA KEYS—VOLUME 3* (Pineapple Press, 2011)

The final volume of Viele's trilogy examines Florida's wrecking industry. Viele provides a particularly detailed account of the equipment used in salvage operations.

16) SHARON WELLS, *FORGOTTEN LEGACY: BLACKS IN NINETEENTH CENTURY KEY WEST* (Historical Florida Keys Preservation Board, 1982)

This small pamphlet, a mere 60 pages, provides a powerful picture of the condition of Blacks in Key West. It includes details of the Bahamian migration to Key West (1825) and the legal status and treatment of enslaved people in the city before and during the Civil War. Wells describes how Key West, far removed from the mainland, and with an economy focused on the sea, differed in important respects from the rest of the South, which relied on agriculture and the production of cotton. Photographs and documents are reproduced throughout the volume.

17) LOUISE V. WHITE & NORA K. SMILEY, *HISTORY OF KEY WEST: TODAY AND YESTERDAY* (Great Outdoors Publishing Co. Inc., 1959)

Although this short pamphlet (104 pages) dutifully recounts Key West's history, its real value lies in its extensive discussion of the island's principal industries: cigar manufacturing, farming, fishing, salt making, sponging, turtling, and wrecking.

B. ARTICLES

18) Vaughn Camp, Jr., *Captain Brannan's Dilemma: Key West in 1861*, 20 TEQUESTA 31 (1960)

Camp describes the challenges faced by Captain James M. Brannan, the senior Union officer on Key West, in trying to maintain control of Fort Zachary Taylor in the months preceding the start of the Civil War. According to Camp, Brannan's success in keeping both the fort and the island out of Confederate hands was critical to the Union's wartime success.

19) Antonio Rafael de la Cova, *Cuban Exiles in Key West During the Ten Years' War, 1868-1878*, 89 FLA. HIST. Q 287 (2011)

This article details the migration of Cubans to Key West during Cuba's Ten Years War. In addition to explaining the political events in Havana that caused the influx, de la Cova describes the refugees' integration into their new community.

20) James M. Denham & Keith L. Huneycutt, "*Our Desired Haven*": *The Letters of Corinna Brown Aldrich from Antebellum Key West, 1849-1850*, 79 FLA. HIST. Q. 517 (2001)

Denham and Huneycutt use letters written by a woman (Corinna B. Aldrich) living in Key West to describe life in the 19th century. Although the authors provide extensive background information, the bulk of the article consists of Aldrich's letters to her family describing her travel to the island, her life there, and the financial wealth and natural resources of Key West. The authors later turned their article into a book titled *Echoes from a Distant Frontier: The Brown Sisters' Correspondence from Antebellum Florida* (University of South Carolina Press, 2004).

21) Albert W. Diddle, *Medical Events in the History of Key West*, 6 TEQUESTA 14 (1946) (previously published at 15 BULL. HIST. MED. 445 (1944) and 31 J. FLA. MED. ASS'N 207 (1944))

This article describes the development of medical facilities in Key West, as well as how outbreaks of diseases ranging from cholera to yellow fever helped shape the city. Diddle also outlines the methods used to fight these maladies, which included quarantining ships arriving from foreign ports.

22) Dorothy Dodd, *The Wrecking Business on the Florida Reef 1822-1860*, 22 FLA. HIST. Q. 171 (1944)

Dodd recounts the history of wreckers in the Florida Keys. She also discusses the various laws that were enacted to control the industry and highlights both the business and legal aspects of wrecking.

23) Jose B. Fernandez & Jerrell H. Shofner, *Martyrs All: The Hero of Key West and the Inocentes*, 33 TEQUESTA 31 (1973)

In 1870, journalist Gonzalo Castañón Escarano was murdered in Key West. One year later, eight innocent Cuban medical students were executed after they were wrongfully accused of desecrating Castañón's remains. As Fernandez and Shofner explain, both incidents shocked the city.

24) Mary & Karl Haffenreffer, *Deeds and Misdeeds: The Title to Key West 1815-1833*, 21 FLA. KEYS SEA HERITAGE J. 6 (Summer 2011)

The Haffenreffers describe how the confused state of land titles in early Key West was resolved in 1833 “by consolidation of ownership, agreement among the proprietors, Congressional confirmation, and the sale of certain parcels to the United States.”

25) E. Ashby Hammond, *Notes on the Medical History of Key West, 1822-32*, 46 FLA. HIST. Q. 93 (1967)

A description of the early medical history of Key West, which experienced repeated outbreaks of cholera, malaria, smallpox, and yellow fever. Hammond’s focus is on the disease-fighting efforts of the U.S. Navy prior to the arrival of civilian medical personnel.

26) *Key West and Salvage in 1850*, 8 FLA. HIST. Q. 47 (1929)

This piece is a compilation of earlier articles and reports on the salvage industry during a specific year (1850). It provides readers with an understanding of just how substantial the salvage industry was in the city. Although the article includes general information about Key West, its real worth lies in its detailed statistics about the wrecking industry.

27) *Key West in the Summer of 1864*, 43 FLA. HIST. Q. 262 (1965) (edited by Millicent Todd Bingham)

From February 1864 to August 1865, Colonel John A. Wilder of the U.S. Army was stationed at Key West. This article reprints three letters he wrote to his family in the Summer of 1864 describing how he and his men were faring during an outbreak of yellow fever.

28) Corey Malcolm, *Understanding the Key West Hurricane of 1846*, 20 FLA. KEYS SEA HERITAGE J. 1 (Summer 2010)

This lengthy article recounts Key West’s encounter with the 1846 “Havana Hurricane.” As Malcom documents, the storm struck Cuba as a Category 5 hurricane on the morning of October 11 and a short time later reached Key West, where it killed 40 people (4% of the city’s population) and caused \$200,000 in damage (the modern-day equivalent of \$6.7 million).

29) Edward E. Poyo, *Key West and the Cuban Ten Years War*, 57 FLA. HIST. Q. 289 (1979)

In this article, Poyo details how Cuba’s Ten Years War (1868-78) affected Key West. This was the first of three wars fought between Cuba and Spain, the second being the Little War (1879-80) and the third being the Cuban War of Independence (1895-98), which led to the Spanish-American War (1898). In 2014, Poyo published *Exile and Revolution: José D. Poyo, Key West, and Cuban Independence* (University Press of Florida). For another such work, see Alejandro F. Pascual’s *Key West: Passion for Cuba’s Liberty* (Ediciones Universal, 2013).

30) Clayton D. Roth, Jr., *150 Years of Defense Activity at Key West, 1820-1970*, 30 TEQUESTA 33 (1970)

Roth looks at the military importance of Key West during its first 150 years as an American possession. The first half of his article focuses on the West Indies Squadron (which cleared the waters surrounding Key West of pirates) (1822-25) and the U.S. Navy’s role in Key West during the Civil War.

31) Mark A. Smith, *Engineering Slavery: The U.S. Army Corps of Engineers and Slavery at Key West*, 86 FLA. HIST. Q. 498 (2008)

In 1816, the federal government decided to build a series of coastal forts to protect the United States’ Southern border. To obtain the labor needed for this

ambitious undertaking, the U.S. Army Corp of Engineers leased enslaved workers from their owners. This led to a vast increase in the number of enslaved people in Key West. Smith also describes what enslaved life was like on the island and the numerous escapes that were attempted. In 2018, the National Park Service issued a small (96 pages) booklet about these matters. See Jennifer Pirtle, Greg C. Smith, and Mary Beth Reed, *The African American Experience at Fort Jefferson 1847-1876*, available at <http://www.nps.history.com/publications/drto/african-american-experience.pdf>.

32) *Two Opinions of Key West in 1834*, 20 TEQUESTA 45 (1960) (edited by Charlton W. Tebeau)

Tebeau reprints two letters to the editor that appeared in volume 3 of the *Military and Naval Magazine of the United States*. The first, written by an individual identified only as "T.P.," appeared in the March 1834 issue. It harshly criticized how Key West's military base was being operated. The second, co-authored by Major J.M. Glassell and Lieutenant F.D. Newcomb, appeared in the June 1834 issue. Predictably, it defended the base's administration.

33) Charles Walker, "*The City of Wreckers*": *Two Key West Letters of 1838*, 25 FLA. HIST. Q. 191 (1946) (edited by Kenneth Scott)

In 1838, Charles Walker sent two letters to his family describing his life in Key West. In addition to discussing the island's natural beauty, the letters challenge the negative view of wreckers held by most Americans.

34) *William Adee Whitehead's Description of Key West*, 12 TEQUESTA 61 (1952) (edited by Rembert W. Patrick)

In 1835, John Rodman, a resident of St. Augustine, Florida, wrote to William A. Whitehead requesting information about Key West. Whitehead, who had moved from New Jersey to Key West in 1828, sent a 4,000-word reply in which he described the city in detail. Patrick reprints Whitehead's letter in full and adds an introduction. Although Whitehead left Key West in 1838, he retained a keen interest in the city, and in 1877 published his memoirs (*see next entry*).

35) *William Adee Whitehead's Reminiscences of Key West*, 25 TEQUESTA 3 (1965) (edited by Thelma Peters)

This article reprints a series of letters that William A. Whitehead sent to the editors of Key West's local newspaper in 1877. In them, Whitehead recalls his time on the island (1829-38). In a short introduction, Peters explains how Whitehead came to write the letters.

36) Ames W. Williams, *Stronghold of the Straits: A Short History of Fort Zachary Taylor*, 14 TEQUESTA 3 (1954)

Williams describes the arduous effort to build Fort Zachary Taylor to protect Key West from attack. As Williams explains, work on the fort began in 1845 and continued until 1866, when construction on the still-unfinished structure (which in 1855 had been named for America's 12th president) was permanently halted. In addition to the Civil War, the fort's progress had been stymied by hurricanes and repeated outbreaks of yellow fever.

37) W.N. Witzell, *The Origin of the Florida Sponge Fishery*, 60 MARINE FISHERIES REV. 27 (1998)

Witzell charts the history of the sponge fishing industry in Key West from its beginning in 1852 to its decline in 1939. During its peak, sponging was second only to cigar manufacturing in terms of its economic importance to the city.

38) *Wreckers and Wrecking on the Florida Reef, 1829-1832*, 41 FLA. HIST. Q. 239 (1963) (edited by E.A. Hammond)

Between 1829 and 1832, Dr. Benjamin B. Strobel, a Key West resident, wrote numerous reports about the wrecking industry, many of which later appeared in various newspapers in Charleston, South Carolina. A slightly different version of this article appears as *Sketches of the Florida Keys, 1829-1833*, 29 TEQUESTA 73 (1969).

C. JOURNALS

39) FLORIDA HISTORICAL QUARTERLY (since 1908)

The *FHQ* is the flagship publication of the Florida Historical Society (<https://myfloridahistory.org/>). Since 1995, it has been edited at the University of Central Florida (previously it had been housed at the University of Florida and then the University of South Florida). Back issues are available online at <https://stars.library.ucf.edu/fhq/>. Many articles contain references to Key West's past.

40) FLORIDA SEA HERITAGE JOURNAL (1989-2015)

This quarterly newsletter was published by the Key West Maritime Historical Society (<https://keywestmaritime.org/>). Select issues, as well as a topic index, are available online at <https://keywestmaritime.org/journal/>.

41) MARTELLO (1964-73)

This yearly magazine, named for the two towers built by the Union in 1862 to provide defensive support for nearby Fort Zachary Taylor, was produced by the Key West Art and Historical Society (<https://www.kwahs.org/>). Copies of the seven volumes that were released before publication ceased can be found in various libraries, including the University of Florida (Gainesville), the University of Miami (Coral Gables), and the State Library of Florida (Tallahassee).

42) TEQUESTA (since 1941)

This annual journal, originally overseen by the Historical Association of Southern Florida, now is under the auspices of the History Miami Museum (<https://historymiami.org/>). Over the years, it has included many articles about Key West's history. Back issues are available through Florida International University's digital repository at <http://dpanther.fiu.edu/dPanther/collections/TEQ> and the University of Florida's digital collection at <https://ufdc.ufl.edu/title-sets/UF00101446>.

D. DISSERTATIONS

43) William Carl Shiver, *The Historic Architecture of Key West: The Triumph of Vernacular Form in a Nineteenth Century Florida Town* (unpublished Ph.D. dissertation, Florida State University, 1987) (available online in ProQuest Dissertations & Theses Global)

This study traces the development of Key West's architecture from 1821 to 1912. The first four chapters focus on the period 1821 to 1870. As Shiver points out, nearly all structures (commercial and residential) in Key West in the 19th century were built out of wood and closely resembled one another. Shiver attributes this "sameness" to the lack of "professional architects" on the island.

III. LEGAL WORKS

A. BOOKS

44) FLORIDA'S OTHER COURTS: UNCONVENTIONAL JUSTICE IN THE SUNSHINE STATE (Robert M. Jarvis ed., University Press of Florida, 2018)

This book examines Florida's historical and "special purpose" courts. Of particular interest are the chapters on the territorial courts (by Christopher A. Vallandingham) and the confederate courts (by Robert W. Lee). The chapter on military courts (by J.R. Frakt) discusses Dr. Samuel Mudd's imprisonment in Key West following his conviction for taking part in the successful plot to assassinate President Abraham Lincoln (1865). Mudd's exact role in the killing remains a hotly debated topic and has been the subject of numerous books, the most readable of which remains Samuel Carter III's *The Riddle of Dr. Mudd* (Putnam, 1974).

45) KERMIT L. HALL & ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990 (Carlson Publishing Inc., 1991)

Although this book covers the entire state, the chapters on the territorial courts and the pre- and post-Civil War eras underscore how important Key West and the wreckers were to the state.

46) WILLIAM MARVIN, A TREATISE ON THE LAW OF WRECK AND SALVAGE (Little, Brown & Co., 1858)

Upon its publication, this book instantly became the leading U.S. work on salvage law. Written by William Marvin, the first judge of the U.S. District Court for the Southern District of Florida, the first two chapters focus on salvage in Key West. The rest of the book covers various evidentiary and procedural issues, as well as the making and enforcement of salvage awards.

B. ARTICLES

47) *Autobiography of William Marvin*, 36 FLA. HIST. Q. 179 (1958) (edited by Kevin E. Kearney)

This article is an edited version of William Marvin's unpublished autobiography. It covers (among other topics) his move to Key West; his time as the city's U.S. attorney and federal judge; and his work deciding prize and salvage cases.

48) Hugo L. Black III, *Richard Fitzpatrick's South Florida, 1822-1840, Part I: Key West Phase*, 40 TEQUESTA 47 (1980)

Black recounts the life of Richard Fitzpatrick, a member of Key West's "ruling class." In addition to his wrecking activities (which included serving as an auctioneer of salvaged goods in the days before Key West had an admiralty court), Fitzpatrick was a justice of the peace. As such, Black devotes considerable attention to the laws governing enslaved people in the territory.

49) J. Allison DeFoor II, *A Legal History of the Fabulous Florida Keys*, 21 INT'L SOC'Y BARRISTERS Q. 283 (1986)

In 1986, DeFoor gave a speech at the annual meeting of the International Society of Barristers (held that year in Key Largo). In addition to providing a short account of Key West's legal history, DeFoor discusses the influence of the cigar and wrecking industries.

50) James M. Denham, *Captain Charles E. Hawkins, "The Key West Tragedy," and the "Unwritten Law," 1827-1830*, 99 FLA. HIST. Q. 237 (2021)

Denham provides a gripping account of the 1829 killing of William A. McRea by Charles E. Hawkins. Following the murder, Hawkins was arrested and sent to St. Augustine to await trial. Public opinion, however, shifted in Hawkins's favor after it was learned that McRea had been sleeping with Hawkins's wife. As a result, in 1831 the Florida Territorial Council ordered Hawkins released "from any further prosecution."

51) Albert W. Diddle, *Adjudication of Shipwrecking Claims at Key West in 1831*, 6 TEQUESTA 44 (1946)

Diddle examines Key West's wrecking industry over the course of a single year (1831). He covers how much and how compensation was paid; how the courts tried to discourage unscrupulous behavior; and how weather and other factors affected the wreckers' profits.

52) Tom & Lynda Hambright, *Justice in Early Key West*, 9 FLA. KEYS SEA HERITAGE J. 14 (Spring 1999)

On July 5, 1830, Norman Sherwood killed John Wilson at Abraham Butcher's Key West grog house. After a quick trial before Territorial Court Judge James Webb, Sherwood was hung on December 10, 1830. This marked the first execution in the city's history.

53) Robert W. Lee, *Florida Legal History: The Courts and Law During the Civil War, Reconstruction and Restoration Eras*, 15 ST. THOMAS L. REV. 485 (2003)

Lee details the operation of the courts in Florida during the Civil War. The courts in Key West are notable outliers, as they continued to operate under federal law even after Florida joined the Confederacy.

54) W. Randy Miller, *The Case of the Brig Halcyon: A Study in Old Key West Admiralty Law*, 27 J. MAR. L. & COM. 311 (1996)

This article provides a snapshot of the wrecking industry through the lens of an 1830 case. As Miller shows, the adjudication of salvage claims in Key West left much to be desired prior to the appointment of Judge William Marvin (1839).

55) Symposium, *Key West in the Civil War Era*, 12 BRIT. J. AM. LEGAL STUD. 191-402 (2023)

This special issue of the *British Journal of American Legal Studies* opens with three articles by Professor Robert M. Jarvis, the symposium's organizer. The articles are followed by five essays, a bibliography, and a book review penned by prominent historians and lawyers. Much of the focus is on U.S. District Judge William Marvin. Other subjects covered include the Confederacy's attempt to establish a prize court in Key West; the role played by Great Britain in the Civil War; and Spain's use of consular agents to keep watch over the island's activities.

C. PRIMARY SOURCES

1. Confederate Sources

56) An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida, Mar. 11, 1861, ch. 39 (available online from the University of North Carolina at <https://docsouth.unc.edu/imls/19conf/19conf.html>)

This legislation authorized the establishment of a Confederate prize court at Key West. Due to the city being in Union hands, the court never opened, forcing the court's judge (McQueen McIntosh) to ride out the war elsewhere.

57) An Act to Amend an Act Entitled “An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida,” Mar. 15, 1861, ch. 47 (available online from the University of North Carolina at <https://docsouth.unc.edu/imls/19conf/19conf.html>)

This legislation made minor changes in the procedures of the Confederacy’s planned prize court at Key West (*see previous entry*).

2. Federal Sources

58) Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-U.S., Feb. 22, 1819, 8 Stat. 252 (available online from Yale University at https://avalon.law.yale.edu/19th_century/sp1819.asp)

Better known as the Adams-Onís Treaty (for its two principal negotiators, U.S. Secretary of State John Quincy Adams and Spanish diplomat Luis de Onís y González-Vara), this agreement ceded the Spanish territories of East Florida and West Florida to the United States along with all public (but not private) property. It also required the United States to transport all Spanish troops to Havana within six months of ratification and confirmed all land grants made by the Spanish (contingent upon the recipients fulfilling the terms of their grants).

59) An Act to Provide for the Collection of Duties on Imports and Tonnage in Florida, and for Other Purposes, ch. 62, 3 Stat. 684 (1822)

Section 3 of this law made Key West a collection district for the payment of import duties and taxes. An amendment in 1832 (ch. 201, 4 Stat. 576) enlarged the district’s boundaries and made certain other changes, leading to a boom in the number of ships visiting Key West and turning the city into an important commercial hub.

60) An Act to Establish a Southern Judicial District in the Territory of Florida, ch. 77, 4 Stat. 291 (1828)

This law authorized the creation of a federal court in Key West during Florida’s territorial period. The statute empowered the court to both hear salvage cases and license wreckers (confirmed after statehood by ch. 20, 9 Stat. 131 (1847)—*see next entry*).

61) An Act to Establish a Court at Key West, in the State of Florida, and for Other Purposes, ch. 20, 9 Stat. 131 (1847)

This law created the U.S. District Court for the Southern District of Florida and directed that it “consist of one judge, who shall reside at Key West.”

62) THE TERRITORIAL PAPERS OF THE UNITED STATES, VOLS. XXII-XXVI (Clarence Edwin Carter ed., Government Printing Office, 1956) (this collection has been partially digitized by the National Archives—see <https://catalog.archives.gov/id/218518468>; see also HeinOnline at <https://home.heinonline.org/>)

The Territorial Papers of the United States is a compilation of various government documents generated between 1787 and 1848. Because the U.S. Department of State was responsible for territorial affairs, there is an emphasis on its materials. Volumes XXII-XXVI cover the Territory of Florida from 1821 to 1845 and include papers relating to the territory’s administration and staffing. Also included are documents relating to John W. Simonton, who in 1822 purchased Key West (at the time known as “Cayo Hueso,” or Bone Island) from Juan Pablo Salas. (In 1815, Don Juan de Estrada, Spain’s governor of Florida, had granted the island to Salas for his numerous services to the crown.) Each volume includes an index.

3. Florida Sources

63) An Act to Incorporate the Town of Key West, approved Nov. 28, 1828, in ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 296 (1829) (available online from the State Library of Florida at <http://edocs.dlis.state.fl.us/fldocs/leg/actterritory/1828.pdf>)

This law created the Town of Key West; established its form of government; determined how elections would occur; and specified the duties and powers of the town council. Those eligible to vote were White men over the age of 21 who had resided in the town for at least three months.

64) An Act to Incorporate the City of Key West, approved Feb. 2, 1832, in ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 11 (1832) (available online from the State Library of Florida at <http://edocs.dlis.state.fl.us/fldocs/leg/actterritory/1832.pdf>)

This law incorporated the City of Key West and changed its form of government to that of a mayor-alderman system. Eligible voters now had to be U.S. citizens and residents of the city for at least 12 months.

65) STATE LIBRARY OF FLORIDA, A GUIDE TO RESEARCHING THE TERRITORIAL ERA AT THE STATE ARCHIVES OF FLORIDA (available online at <https://www.floridamemory.com/learn/research-tools/guides/territorialguide/page1.php>)

This web site provides links to primary Florida materials, including court records, executive orders, and legislative acts. Despite its name, the site is not limited to Florida's territorial period (1821-45) but instead extends into the 21st century.

IV. POPULAR CULTURE WORKS

66) RICHARD MEADE BACHE, THE YOUNG WRECKER OF THE FLORIDA REEF: OR, THE TRIALS AND ADVENTURES OF FRED RANSOM (James S. Claxton, 1866)

The hero of this novel is Fred Ransom, a 15-year-old boy who runs away to sea in 1839. As the title suggests, Ransom joins a wrecker and spends time working off the coast of Key West and visiting the city.

67) JOANNA BRADY, THE WOMAN AT THE LIGHT: A NOVEL (St. Martin's Press, 2012)

In 1839, Emily Lowry's husband mysteriously vanishes from Wreckers' Cay, an isolated island off the coast of Key West. Needing to support her three—soon to be four—children, Emily takes over his duties as lighthouse keeper. Although help soon arrives in the form of a runaway slave named Andrew, Emily's challenges are just beginning.

68) IRIS CHACON, MUDSILLS & MOONCUSSERS: A NOVEL OF CIVIL WAR KEY WEST (CreateSpace Independent Publishing Platform, 2016)

This romance novel is set in Key West at the outbreak of the Civil War. Aaron Mathews, a Union spy, has orders to find and kill a Confederate saboteur operating out of the city. But as his investigation proceeds, he slowly begins to realize that the person he is after is his new love interest, a woman named Josephine Marie Thibodeaux.

69) JAMES FENIMORE COOPER, JACK TIER; OR THE FLORIDA REEF (Hurd and Houghton, 1848)

Much of this adventure novel takes place in and around Key West. Although the book focuses on salvage and wrecking, the Mexican-American War (1846-48) and mistaken identities add to the plot.

70) Keith Huneycutt, *The Storm: True Womanhood, Feminism, and Companionate Marriage in Antebellum Key West*, 79 CEA [COLLEGE ENGLISH ASSOCIATION] CRITIC 291 (2017)

In this article, Huneycutt discusses “The Storm,” an unpublished 90-page “story that explores issues surrounding marriage in mid-nineteenth America.” As Huneycutt explains, “[c]onsiderable evidence [exists suggesting] that Ellen Brown Anderson wrote this story between 1854 and 1862, making it the first novel about Key West written by a woman and probably also the first novel written by a woman using a Florida setting.”

71) MARTHA MELAHN, *WAVE OF DESTINY* (Avon Books, 1981)

The action in this romance novel occurs in Key West between 1864 and 1868. As a youngster, Melahn attended boarding school in Key West in the 1930s and drew on her knowledge of the city while writing her novel. In 2000, she published a sequel titled *Encounter with Destiny* (Authors Choice Press) that advances the story to Key West in the 1870s.

72) JANE LOUISE NEWHAGEN, *PIECES OF EIGHT: A TALE OF OLD KEY WEST* (Outskirts Press, 2011)

The heroine of this novel is Julia Miller, a young woman who leaves her home on Green Turtle Cay in the Bahamas to start a new life in Key West in the 1850s. As Miller discovers, however, the island is a harsh and difficult place. This is Newhagen’s second novel about antebellum Key West (*see next entry*).

73) JANE LOUISE NEWHAGEN, *SAND DOLLAR: A TALE OF OLD KEY WEST* (Outskirts Press, 2007)

Set in Key West in 1846, Newhagen’s protagonist is Mary Thorne, the wife of wrecker captain Richard Randall. The plot revolves around Mary’s struggles to adapt to her new life on the island.

74) *REAP THE WILD WIND* (Paramount Pictures, 1942)

Although this movie is based on a romantic short story (*see next entry*), numerous liberties were taken by the Hollywood screenwriters, resulting in a script with considerably more action and thrills. A significant courtroom scene depicts the unscrupulous side of wrecking and makes it clear that some wreckers intentionally caused shipwrecks to earn salvage awards. With a running time of 123 minutes, *Reap the Wild Wind* was directed by Cecil B. DeMille and stars Paulette Goddard, Ray Milland, and John Wayne. In 1943, it won the Oscar for Best Special Effects (beating out such classics as *Mrs. Miniver* and *The Pride of the Yankees*). Copies are available for purchase on Amazon.com in Blu-Ray, DVD, and VHS format.

75) Thelma Strabel, *Reap the Wild Wind*, SAT. EVENING POST, Apr. 27, 1940, at 9; May 4, 1940, at 18; May 11, 1940, at 26; May 18, 1940, at 24; May 25, 1940, at 33

This serialized short story focuses on wreckers in Key West in 1835. Although written as a love story, it provides a useful look at the industry, its captains, their families, the weather that affected their work, and the court that decided their fates. While the story was still in the process of being published, it was announced that Paramount Pictures had decided to turn it into a movie (*see previous entry*).

“MAD PASSIONS OF THE HOUR”: KEY WEST AND THE CIVIL WAR

Canter Brown, Jr.*

ABSTRACT

This review discusses two recent books that focus on Key West in the Civil War. Employing vastly different approaches, both works will have their share of admirers and detractors. Given the complexity of Key West’s role in the Civil War, however, much fertile ground remains for future researchers.

KEYWORDS

Confederate States of America, Cuba, Disease, Fire, Fishing and Sponging, Forts, Historiography, Hurricanes, Key West, Slavery, Spain, U.S. Civil War, Wrecks and Wrecking

CONTENTS

I. INTRODUCTION	392
II. PREVIOUS WORKS	397
III. PRIDE’S BOOK	398
IV. THUERSAM’S BOOK	400
V. CONCLUSION	402

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MIKE PRIDE, *STORM OVER KEY WEST: THE CIVIL WAR AND THE CALL OF FREEDOM*. SARASOTA, FL: PINEAPPLE PRESS, 2020. Pp. 320. \$26.95. ISBN 978-1683340935.

JOHN BERNHARD THUERSAM, *KEY WEST'S CIVIL WAR: "RATHER UNSAFE FOR A SOUTHERN MAN TO LIVE HERE."* COLUMBIA, SC: SHOTWELL PUBLISHING LLC, 2022. Pp. 264. \$24.95. ISBN 978-1947660663.

I. INTRODUCTION

Over the centuries, Key West has inspired distinctive visions for visitors and residents alike: bewitching semi-tropical paradise; boiling cauldron of irredeemable decadence; strategically essential outpost; festering nest of pestilence; or any one of a range of other possibilities, some well-grounded and others arising from mere whimsy or delusion. In 1847, for example, Catharine S. Hart (wife of future Florida governor Ossian B. Hart) lamented, "Vice and immorality and licentiousness is looked upon by some who are heads of families [here in Key West] as no crime and are guilty themselves of many indiscriminate acts."¹

In contrast, in 1849 Dr. Edward Aldrich exulted:

There are as many pleasant families here as you will find in any southern town of the same population—and in praise of the climate—enough cannot be said—The sea breeze is so exhilarating, and the gardens look so green and fresh, that I can [scarce realize] the impression that I am still in Uncle Sam's territories."²

For Brevet Colonel Robert E. Lee, writing home in the same year as Aldrich, Key West offered little that was worthy of recognition or comment. "This is a long narrow low island," he related, "containing a small village, apparently composed of wreckers [salvagers who worked wrecks on the Florida Reef] & those calculated for the wants of the shipping, driven here by distress of some kind."³

No discerning visitor to the island during the Antebellum Era, however, could miss one important fact. After the 1821 cession of Florida to the United States, Key West furnished its new host nation a critical bulwark against the seeming might of the Spanish Empire. Moreover, it offered a marvelous strategic outpost for controlling access from the Atlantic Ocean into the Gulf of Mexico and for projecting national power and influence toward the riches of the West Indies. A 1908 report by the U.S. Naval Institute later highlighted these points:

¹ Letter from Catharine S. Hart to her parents (Abner and Deborah Campbell), Aug. 29, 1847, *available at* <https://ufdc.ufl.edu/UF00096090/00002/images> (University of Florida Digital Collections).

² *ECHOES FROM A DISTANT FRONTIER: THE BROWN SISTERS' CORRESPONDENCE FROM ANTEBELLUM FLORIDA* 229-30 (James M. Denham & Keith L. Huneycutt eds., 2004) (underlining as in the original).

³ Letter from Robert E. Lee to his wife (Mary Anna Randolph Custis Lee), Feb. 22, 1849, *available in* Lee Family Manuscripts, Virginia Museum of History and Culture, at Mss1 L51 c 85-104 (<http://librarycatalog.virginiahistory.org/final/portal.aspx?lang=en-US>).

The strategic value of Key West or any point on the extremity of the western end of the Florida Keys, was recognized long before the Civil War. In fact, during the first part of the last century, when the West Indian Islands, by their production of sugar and tobacco became one of the richest marts in the world, the political control of the West Indies and Caribbean was one of the chief problems of the maritime nations. Our statesmen were not ignorant of these conditions. They have left indisputable evidence of their appreciation of the strategic importance of this region.⁴

Real estate promoters since time immemorial famously have praised “location, location, location,” and so it was with Key West. Less than 100 miles on a southerly course across the Straits of Florida lay Cuba. Covering nearly 45,000 square miles, this lush Spanish dominion outranked Belgium, the Netherlands, and Portugal in size and almost equaled the state of Pennsylvania.⁵ Havana, the island’s urbane capital, lay a mere 105 miles to the south-southwest. With a residential base approaching 200,000 by the early 1860s, that metropolis alone easily dwarfed Florida in population. For that matter, no city of the future Confederate States of America eclipsed its size.⁶

Key West’s strategic importance, ultimately confirmed during the Civil War, also factored significantly when it came to Gulf of Mexico shipping and trade. New Orleans stood out as the region’s dominant port and urban center. Sited on a Mississippi River bow 631 miles northwest of Key West, the “Crescent City” controlled the immense downriver commerce of the fabled “Father of Waters.”⁷ Already by 1820, New Orleans, with more than 27,000 inhabitants, was the fifth largest city in the United States, trailing only New York (123,000), Philadelphia (63,000), Baltimore (62,000), and Boston (43,000).⁸ Four decades later, at the Civil War’s eve, New Orleans’ population had jumped to nearly 170,000. By comparison, the soon-to-be Confederate capital of Richmond, Virginia, counted only about one-quarter as many residents.⁹

Not surprisingly then, federal military authorities moved early to ensure that Key West—despite a tiny social order that numbered about 3,000 people by the Civil War’s onset—could withstand hostile threat and, by implication, that the United States could maintain unshakeable control of the outpost against external or internal assault. The U.S. Navy quickly established a local presence in the 1820s.

⁴ U.S. NAVAL INSTITUTE, PROCEEDINGS: VOLUME 34—PART 1, WHOLE NUMBERS 125, 126, at 608 (1908).

⁵ See BUREAU OF THE CENSUS LIBRARY, CUBA: POPULATION, HISTORY, AND RESOURCES 1907, at 9, 131 (1909).

⁶ See JULIA WARD HOWE, A TRIP TO CUBA 20-131 (1860); *Notes on Cuba*, 3 HARPER’S WKLY. 72 (Jan. 29, 1859).

⁷ WILLARD GLAZIER, DOWN THE GREAT RIVER; EMBRACING AN ACCOUNT OF THE DISCOVERY OF THE TRUE SOURCE OF THE MISSISSIPPI xii, 30 (1892). See also MARK F. BIELSKI, A MORTAL BLOW TO THE CONFEDERACY: THE FALL OF NEW ORLEANS, 1862, at xvii (2021) (describing the significance of New Orleans to the Confederacy).

⁸ See United States Census Bureau, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990* (June 1998), available at [census.gov/library/working-papers/1998/demo/POP-twps0027.html](https://www.census.gov/library/working-papers/1998/demo/POP-twps0027.html).

⁹ See PAUL J. SPRINGER, PROPAGANDA FROM THE AMERICAN CIVIL WAR 118 (2019).

The U.S. Army followed two decades later with construction of Fort Zachary Taylor on Key West itself. Rigors of climate, logistics, fluctuating political winds, local intrigue, and other considerations limited the fort's progress toward completion. Still, as one local historian put it, "[The project] injected new life into the Key West economy."¹⁰ It also encouraged slave ownership through a policy that favored government leasing of enslaved workers from local masters, a factor that generated intense local resentment upon the policy's reversal as the war ensued.

As Fort Taylor evolved into "a massive trapezoidal structure complete with drawbridge and moat,"¹¹ a companion post named Fort Thomas Jefferson grew into one of the largest citadels ever erected by the United States. Located at Garden Key in the Dry Tortugas, about 70 miles west of Key West, the monumental structure was designed to stand defiantly as a "brilliant and undeniable symbol that the United States wanted to be left alone."¹²

While the growing military presence signaled the government's commitment to defense of its prized outpost, the local citizenry nonetheless found themselves repeatedly forced to endure harsh—even fatal—reminders that the government's prowess counted for little against the overwhelming forces of nature. For one thing, hurricanes and other tempests ripped into the island with disturbing frequency. An October 1846 gale known as the "Havana Hurricane" literally tore corpses from the ground as its winds and water nearly obliterated the settlement. Of 600 buildings on the island, only eight survived unscathed. "The [army] barracks were gone," a modern-day chronicler has noted, "as was most of Fort Taylor."¹³

Hand-in-glove with tropical storms came disease. Most frightfully this meant the dreaded yellow fever, more commonly called "yellow jack."¹⁴ As an island resident acknowledged a few years before the Civil War began, "The yellow fever of 1854 will be long remembered in our Island, having left its mark on the bleeding hearts of some of the most estimable members of our society."¹⁵

Not long after the 1854 epidemic, other—and equally ruinous—natural forces paid their visits. This time, flames were the culprit. "The city has been visited by a fire most disastrous in its effects, and from which it cannot recover for years," one newspaper editor reported in May 1859.¹⁶ Another source described the disaster by writing:

On the morning of the 16th the work of destruction commenced in the store of L.M. Shaffer, and raging for eight hours in every direction, reduced full one-half of the best built portion of the city, in that short space of time, to smouldering ruins.

¹⁰ MAUREEN OGLE, *KEY WEST: HISTORY OF AN ISLAND OF DREAMS* 40 (2006).

¹¹ *Id.*

¹² National Park Service, *Fort Jefferson* (Mar. 6, 2021), available at <https://www.nps.gov/drto/learn/historyculture/fort-jefferson.htm>.

¹³ OGLE, *supra* note 10, at 43.

¹⁴ See JOHN R. PIERCE & JAMES V. WRITER, *YELLOW JACK—HOW YELLOW FEVER RAVAGED AMERICA AND WALTER REED DISCOVERED ITS DEADLY SECRETS* (2005).

¹⁵ *Key West Correspondence*, CHARLESTON DAILY COURIER (SC), Sept. 27, 1854, at 2.

¹⁶ See *Terrible Conflagration!*, FLA. PENINSULAR (Tampa), May 28, 1859, at 2.

“MAD PASSIONS OF THE HOUR”:
KEY WEST AND THE CIVIL WAR

The devouring element never found buildings in a better condition for its voracious appetite; for many days no rain had fallen, the broiling sun had absorbed every particle of moisture from the wood and left it dry and tinder-like. After the fire had commenced, there were no means of stopping its progress but by removing the houses from beyond its reach. This was effected after several trials, and by burning three one-hundred pound barrels of gunpowder. There were no means at hand of throwing water but by buckets, the city being unprovided with fire engines; and the flames once under headway, all efforts to quench them were futile.

Besides the buildings burned, a large number of cocoanut [sic] trees were destroyed. These trees, in one or two instances, were the means of saving the buildings which they shaded. The loss of these beautiful trees will be seriously felt for a year to come. Some of them were 40 years old, and had attained great height and beauty. The fire burned over an area of nearly twenty acres, and destroyed property to the value of \$275,000.¹⁷

Despite passionate divisions that soon set many locals at odds with the military, the 1859 fire saw Key West’s residents immensely thankful for the selfless acts of kindness and heroic cooperation offered by the Army and the Navy. One source reported: “Had it not been for the presence of Capt. [John M.] Brann[an] and his company of soldiers, it is impossible to say when the fire would have stopped.”¹⁸ Elsewhere readers learned:

Capt. B. took charge of a large amount of goods and stationed sentinels to guard them. He also, with the assistance of Lieut. [Asher R.] Edd[y], blew up five or six buildings which would have otherwise gone with the rest and assisted in destroying half the city besides. The store ship, *Relief*, was fortunately in port when the fire broke out. Lieut. [Roger] Perry, the officer in command, sent his men ashore to assist the Mayor and the city authorities. Their first act was to save the Custom House, which was done by battling for an hour with the flames. They assisted in demolishing some buildings and protected property already saved.¹⁹

The 1859 fire lamentably, if understandably, left a dark legacy in some quarters as a lingering sense of despair soon fertilized seeds of insular conflict. Some well-heeled residents quickly recovered from the disaster; countless less-fortunate persons experienced prosperity’s return only as it benefitted others. The military, meanwhile, enjoyed the boon of government payrolls delivered in much-envied hard money.

All the while, dynamics swirling within the population at large spurred a slow drift toward division. Key West-born historian Jefferson B. Browne later described the island’s assemblage of humankind as a “rare aggregation”²⁰ and continued:

¹⁷ *The Great Fire in Key West*, DAILY EXCHANGE (Balt.), May 30, 1859, at 1 (paragraphing inserted for improved readability) [hereinafter *Great Fire*].

¹⁸ *Destructive Fire at Key West*, CHARLESTON DAILY COURIER (SC), May 30, 1859, at 2.

¹⁹ *Great Fire*, *supra* note 17 (italics added).

²⁰ JEFFERSON B. BROWNE, KEY WEST: THE OLD AND NEW 174 (1912).

It was a cosmopolitan population; Bahama wreckers and immigrants, small fishermen from Noank and Mystic, Conn., refugees from the mainland, gentlemen from Virginia, Georgia, and the Gulf States, businessmen, commercial adventurers and mechanics from the Northern States, and world wanderers from every portion of the globe, brought to Key West by chance or inclination, and held here by her lotus charms. [Included were] Englishmen, Bahamians, Irish, Dutch, Swedes, Norwegians, Hindoos, Russians, Italians, Spaniards, Cubans, Canary Islanders, South Americans, Canadians, Scotch, French, shipwrecked sailors, deserters and discharged men from the army, navy and marine corps; men who had knocked about all over the world and developed personalities of their own, which they retained. . . .²¹

Browne's portrait of Key West's volatile mix effectively illustrates the diversity of island society. Taken alone, though, his report tends to mislead. For one thing, by 1860 over 600 slaves and free Blacks lived on or near the island.²² Not to be forgotten were those who comprised the majority, a faction often characterized as "Bahamians." Writing in 1853, one newspaper's correspondent remarked:

This "city" contains about 3,000 inhabitants, of which about 300 are slaves, 1,700 are *Conchs*, and the remaining thousand are descended from the 'rest of mankind. These *Conchs* are peculiar specimens of human kind, and immigrated to the Key from the [British] Bahama Islands, some 260 miles to the east of this, upon the other side of the Gulf stream. When first, or wherefore, they were called *Conchs*, authentic history has not informed us. We know, however, that they are descendants of the English emigrants and the royalists of Georgia and Carolina, who settled upon and fled to the sandy and barren Bahama Islands. Living there in comparative indolence, and disregarding the laws of Nature and of Nature's God, by marrying and intermarrying within the prohibited degrees of consanguinity, they have become a distinct class or race, whom the Almighty has, apparently marked with degeneracy. Among their children, and they are legion, you can only occasionally recognize an expression or a feature of the "human face divine."²³

In this same correspondent's opinion, the *Conchs'* former connections to the British Crown—when combined with their ingrained habits and inclination—too often weakened or displaced their newfound attachments to Uncle Sam:

The *Conch-men* of this day and generation, at least upon this island, are a cadaverous, sorry, and fishy-looking *genus hominum*. They are proverbially peaceful, honest, temperate and religious, but have none of the pugnacious energy, scheming proclivity, and perpetual mobility of the Yankees. Their chief business is fishing, sponging, turtling and wrecking,

²¹ *Id.*

²² *Id.* at 173.

²³ *Key West*, Feb. 8, 1853, SAVANNAH DAILY GEORGIAN, May 14, 1853, at 2 (italics as in the original).

and generally on their own account, and not as the “hirelings” of others. The labor which a Northern or Western man performs at a dollar a day, and one hundred and fifty a year, the *Conch* regards as *servile*. . . . Their wants are few, and in this latitude and locality, easily supplied. Their principal food being fish, the waters around the Key furnish a continuous and inexhaustible supply, and occasional wrecking procures for themselves and families the necessary clothing, bread, groceries, &c.²⁴

II. PREVIOUS WORKS

As the city’s melting pot simmered in the late 1850s and early 1860s, state, regional, and national events jolted the nation step by step toward unthinkable disunion. Given the island’s prevailing circumstances, the jolts were bound to echo profoundly—and violently—in the small but increasingly complex and often-conflicted world that Key West was becoming. Above all else, the island’s strategic positioning—when combined with the powerful presence of Forts Taylor and Jefferson—virtually guaranteed that upcoming military and political movements would project national turmoil directly on the Keys.

It may come as a surprise to some to learn that only recently have scholars and professional writers taken substantive first steps to provide ready access to Key West’s rich Civil War experience. The delay’s causes are discernable and in good part human in nature. During the war, local fissures and fractures compounded themselves. Passions, some sadly not fully resolved today, soared. Valuable personal and economic interests faced challenge, hard positions were staked out, pain and loss visited every quarter, and loyalties suffered strain and too often were betrayed. Along the way, embarrassing, hurtful, and sometimes horrible mistakes were made.

Accordingly, during the post-Civil War decades many locals held to the conviction that memories of that dreadful time remained too hot to be aired openly. In 1876, for example, Walter C. Maloney barely mentioned the conflict in a historical address given at a gathering convened to celebrate Key West’s new city hall. For the published version of his talk, though, Maloney reluctantly appended six pages of conflict-related information. He tellingly introduced the material as follows:

It is with great repugnance, and only after repeated solicitations, that I have consented to add to the foregoing address some references to a few of the incidents which transpired in your city, during the period embraced within the years 1861 and 1865. My unwilling consent has only been obtained upon the *plea of justice* to the memory of those now dead, whose confidence I enjoyed and whose sympathies I shared. The disruption of social, conjugal, fraternal, political, and even religious ties, wrought by real or fancied grievances, growing out of the mad passions of the hour during that period, serves as a beacon to warn against the danger of re-opening wounds not yet fully healed.²⁵

²⁴ *Id.* (italics as in the original).

²⁵ WALTER C. MALONEY, *A SKETCH OF THE HISTORY OF KEY WEST, FLORIDA* 62 (1876) (italics as in the original).

Three dozen years elapsed thereafter before the first extensive “history of Key West” reached publication. It came in the form of Jefferson Browne’s *Key West: The Old and the New*.²⁶ This 1912 work allotted nine of its 200 or so pages of text to the Civil War. Evidencing a decidedly pro-rebel stance, Browne introduced his wartime discussion thusly: “The influence of the cultured Southern men who located in Key West in the early days fostered the spirit of resisting Federal usurpation.”²⁷ While available space for wartime coverage proved dear for Browne, he managed nonetheless to enumerate all members of “that band of noble men who left Key West . . . to fight for their native Southland.”²⁸

Matters rested essentially as Browne had presented them for nearly a century. A noteworthy breakthrough arrived beginning in the late 1980s when retired telephone company executive Lewis G. Schmidt self-published several volumes—and penned numerous locally-circulated essays—that addressed Key West’s Civil War happenings.²⁹ Offering a wealth of original source materials, Schmidt’s writings particularly highlighted the 47th Regiment of Pennsylvania Volunteers, a unit with extended service on the island.³⁰

Capitalizing partly on Schmidt’s output, Maureen Ogle in 2006 acted to supplant Browne’s work with her own *Key West: History of an Island of Dreams*.³¹ Notably, Ogle aimed for a popular, as opposed to a scholarly or specialized, audience. As one commentator observed: “Ms. Ogle was a historian at the University of South Alabama, but left in 1999 because she no longer wants to write for an academic audience.”³²

Ogle’s daunting task called for an approachable synopsis of the city’s entire story almost to the 21st century, all within 300 generously illustrated pages. She dedicated one-twelfth of that total to the Civil War. Although space considerations strictly limited the depth of her examinations, Ogle’s approach and tone evidenced greater objectivity, and better underscored the diversity of the island’s wartime experience, than had Browne’s narrative.³³

III. PRIDE’S BOOK

The 21st century had gotten well underway with no study focused directly on Key West’s Civil War experience coming to the public’s attention. This milestone ultimately was reached in 2020 when Florida’s respected Pineapple Press released

²⁶ See *supra* note 20.

²⁷ *Id.* at 90.

²⁸ *Id.* at 97.

²⁹ See 3 LEWIS G. SCHMIDT, *THE CIVIL WAR IN FLORIDA: A MILITARY HISTORY: FLORIDA’S KEYS & FEVERS* (1992). Portions of this book later (1998-2000) were serialized by the *Florida Keys Sea Heritage Journal* (<https://keywestmaritime.org/journal/>).

³⁰ See LEWIS G. SCHMIDT, *A CIVIL WAR HISTORY OF THE 47TH REGIMENT OF PENNSYLVANIA VOLUNTEERS* (1986).

³¹ See *supra* note 10.

³² Jason M. Breslow, *History for the Masses*, CHRON. HIGHER EDUC., May 30, 2007, available at chronicle.com/article/history-for-the-masses/.

³³ See OGLE, *supra* note 10, at 55-80.

Mike Pride’s competently researched and very readable *Storm Over Key West: The Civil War and the Call of Freedom*.³⁴

A veteran journalist and author who for many years administered the Pulitzer Prize Board’s work, Pride, insofar as possible, exposes readers to the era’s events and personalities through the voices of those who lived and died in the region. As a result, his narrative expresses the passions, agonies, and even boredom of daily life and experience.

Perhaps most movingly, Pride underscores the profoundly disturbing terror of prostration and death at the whim of smallpox, yellow fever, and other tropical diseases. As he illustrates, the war for many at Key West did not so much involve combat with an armed enemy or clashes between Union occupiers and secessionist locals. Rather, it came down to a life-or-death struggle with little-understood natural afflictions and incessant grappling with uncontrollable anxieties about hidden dangers, including the mysterious hazards of swamp seepages and the frightful consequences of inhaling miasmic gas.

Pride’s enthusiastic dependence on personal accounts, while enriching the stories that he shares, inadvertently limits the scope of an otherwise-solid study. As a result, the book’s title overreaches its coverage by depending on White Northern perspectives (whether of military men or otherwise). Local White and Black experiences, in turn, command less attention. The problem is an understandable one. Home-grown Key West newspapers were shuttered early in the war. Correspondence to Southern newspapers that escaped military control efforts tended to become lost. Thus, Northern newspapers, together with the Key West news they contained, enjoyed greater chances for survival than did content published in their Southern counterparts. This same dynamic applied at Key West to personal papers. One can only speculate as to the volume of additional fascinating information lost in the Great Key West Fire of 1886 (the most devastating fire in the city’s history).

Pride’s sources further restrict his accomplishment in that they carry his narrative only so far. The book’s text runs to about 235 pages. That total includes four introductory chapters meant to set the scene for wartime affairs. They cover a glimpse of the Havana Hurricane of 1846 and a portrait of “slave days” that focus on Key West’s famed African American farmer, religious leader, and personality Sandy Cornish. “An account from the diary of [lawyer] William Hackley comes next,” Pride explains.³⁵ “The final prewar chapter tells the harrowing tale of three ships caught in the Caribbean in 1860 and brought to Key West with their human cargo from Africa.”³⁶

Much of the rest of Pride’s narrative adheres relatively closely to his chosen sources and the activities of the individuals and entities introduced by them. Additional contextual material about the complicated and destructive nature of the war elsewhere in Florida—conflict that sometimes directly confronted the military at Key West—would have been useful. Lacking, too, is context related to interaction with the British and Spanish presence in the region, especially wartime travel, trade, and communications from and to the Bahamas and Cuba. British, Bahamian, and Spanish-language publications and archival sources go untapped.

³⁴ See MIKE PRIDE, *STORM OVER KEY WEST: THE CIVIL WAR AND THE CALL OF FREEDOM* (2020).

³⁵ *Id.* at 2.

³⁶ *Id.*

A final thought about *Storm Over Key West*. As suggested by his attention to Sandy Cornish and the slave cargoes, Pride commendably aims to recognize in his book the island's African American heritage and experience. Yet readers are left yearning for additional information about, and personal perspectives of, African Americans. A friend did alert Pride to the rich source materials available in the New York *Anglo-African* newspaper, and he utilized them productively. The presence on Key West of so prominent a future Floridian as John Wallace, though, fails even to merit mention. A soldier in the Second Regiment, U.S. Colored Troops, Wallace fought at Fort Myers and Natural Bridge before going on to service as a state senator; authorship of the state's first history of the Reconstruction Era; and renown as a pioneering black attorney who practiced successfully into the 20th century.³⁷

IV. THUERSAM'S BOOK

Having waited seemingly forever for the first serious examination of Key West's Civil War past, readers in 2022 were presented with a second volume, John Bernhard Thuersam's *Key West's Civil War: "Rather Unsafe for a Southern Man to Live Here."*³⁸ A retired architect from New York who lives in North Carolina, Thuersam's publisher is Shotwell Publishing of Columbia, South Carolina. It was founded in 2015 in response "to the rabid anti-Southern hysteria that began sweeping the country during the build-up to and aftermath of the removal of the Confederate Battle Flag on the grounds of the South Carolina State Capitol."³⁹ The company's motto is "Southern Books. No Apologies."⁴⁰

Thuersam chafes at what he considers unsettling interpretations of the island's wartime heritage. "Above all it is important to point out," he writes, "that the 'unionism' of Civil War-period Key West has been overstated and mistaken from temporary acquiescence to intimidation and the presence of a formidable occupying power."⁴¹

Thuersam's book is best evaluated within the context of its ideological origins. It stands at the end of a continuum that began with the famed Southern Agrarians. This group of 12 writers had taken offense at social critic H.L. Mencken's literary assaults on the South in the 1920s and mounted a defense in *I'll Take My Stand: The South and the Agrarian Tradition* (1930).⁴²

Thuersam's direct link with the Agrarians comes through their disciple

³⁷ See Larry Eugene Rivers & Canter Brown, Jr., *Attorney John Wallace: Pioneering the Profession of Law within Florida's African American Community*, 30 J. GA. ASS'N HISTORIANS 1, 4 (2011); James C. Clark, *John Wallace and the Writing of Reconstruction History*, 67 FLA. HIST. Q. 409, 410-11 (1989).

³⁸ See JOHN BERNHARD THUERSAM, *KEY WEST'S CIVIL WAR: "RATHER UNSAFE FOR A SOUTHERN MAN TO LIVE HERE"* (2022).

³⁹ Shotwell Publishing LLC, *About Us*, at <https://shotwellpublishing.com/about/>.

⁴⁰ *Id.* at homepage.

⁴¹ THUERSAM, *supra* note 38, at vi.

⁴² See TWELVE SOUTHERNERS, *I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* (1930). On the Southern Agrarians generally, see, e.g., PAUL V. MURPHY, *THE REBUKE OF HISTORY: SOUTHERN AGRARIANS AND AMERICAN CONSERVATIVE THOUGHT* (2003); PAUL KEITH CONKIN, *THE SOUTHERN AGRARIANS* (2001).

Clyde N. Wilson, a longtime University of South Carolina professor of history; co-founder (in 1980) of *Southern Partisan* magazine; and editor of the John C. Calhoun papers.⁴³ Additionally, Wilson edited 1981's *Why the South Will Survive: Fifteen Southerners Look at Their Region a Half Century After I'll Take My Stand*.⁴⁴ Wilson also is the co-founder and co-publisher of Shotwell Publishing.⁴⁵

Thuersam acknowledges his debt to Wilson as the first among those "who helped educate, prepare, guide and inspire me."⁴⁶ Wilson, in turn, contributes the Foreword to Thuersam's book and characterizes the American Civil War as "the great American bloodletting of 1861-65."⁴⁷

Thuersam's book delivers (in 226 pages of text) on his promise to feature Key West's secessionist and pro-Confederate elements. He takes pains, for instance, to trace in detail the wartime Confederate service of local men, especially those associated with the Key West Avengers. He additionally delights in exposing instances of anti-abolitionist sentiment within the 47th Pennsylvania Regiment (among other Union military elements). Most remarkably, perhaps, he rehabilitates pro-secessionist Conchs as stalwarts of the local scene while praising them "above all [for] maintain[ing] a defiant Loyalist tradition with pride in their British heritage."⁴⁸

Given the foregoing, readers should take care when entering the world presented by Thuersam; they also should go into it with their eyes wide open. Thuersam often presses along heedless, or even disdainful, of the need for context other than that supplied by his own ideological conceptualizations. A reader at times is left fearing that the very idea of complexity and diversity of experience seems anathema to Thuersam. Perhaps more harmful, he lapses into serious mistakes of fact, a possibility that, to his credit, he concedes is likely. "I admit apprehension to any claim of complete accuracy within these pages, despite the laborious research of nearly three years," he declares.⁴⁹

One specific example illustrates the greater problem. Thuersam wants to declare Reconstruction a failure. To do so, he observes: "A fitting commentary on 'Reconstruction' was offered by black Charlotte editor Richard Henry Cain, who wrote that when it concluded, 'The Negroes had gained nothing, Southern whites have nothing left, and the Northern jackals have taken all the booty.'"⁵⁰ Future African Methodist Episcopal Bishop Cain's words actually were written in late 1871, long before Reconstruction's end, and referred only to the South Carolina legislature's work product. Cain wrote: "When the smoke and fighting is over, the negroes have nothing gained and the whites have nothing left, while the jackals have all the booty."⁵¹

⁴³ See Clyde N. Wilson, WIKIPEDIA: THE FREE ENCYCLOPEDIA, at en.wikipedia.org/wiki/Clyde_N._Wilson.

⁴⁴ *Id.*

⁴⁵ See Shotwell Publishing LLC, *Clyde N. Wilson*, at <https://shotwellpublishing.com/authors#clyde-wilson>.

⁴⁶ THUERSAM, *supra* note 38, at vii.

⁴⁷ *Id.* at I.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.* at vii.

⁵⁰ *Id.* at 193.

⁵¹ *Assembling of the Legislature*, CHARLESTON DAILY COURIER (SC), Nov. 13, 1871, at 1.

V. CONCLUSION

Those interested in the Civil War, Florida, and Key West at least can take comfort that the processes have begun in earnest to place the island's story in its proper place within Civil War historiography. No future researcher, however, needs to feel discouraged that this fertile ground has been over-tilled, nor believe that no rewards of insight or information remain to be uncovered.

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